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CONVEYANCER'S NOTEBOOK

REPORT ON H.M. LAND REGISTRY FOR 1952–53

In his annual report to the Lord Chancellor on H.M. Land Registry for the year 1952–53 (H.M. Stationery Office, price 1s.), the Chief Land Registrar stresses that the year was remarkable for a change in the character of the work that his department handled. For example, the number of simple transfers of the whole of the land in a title decreased whilst the number of transfers of part, which obviously are less easy to handle, increased. This change was, no doubt, due in part to the extension of compulsory registration to Surrey. There was a drop in the number of building society and friendly society charges and of notices of deposit that were presented for registration but more private mortgages were registered. Factors such as these increased the pressure of work, but nevertheless the average time taken to complete all dealings by registration was reduced this year to 11 days. This is a remarkable improvement on the position only five years ago when about 125 days were occupied over similar transactions.

It is regrettable that a lack of typists still prevents restrictive covenants from being set out in full on the register where more than a page of typing is involved but, on the other hand, considerable progress has been made in making photographic copies of documents of a reduced size suitable for sewing up inside certificates of title. In response to a demand from some practitioners, much fuller particulars of easements have been set out on the register than heretofore and the recently revived practice of including in land and charge certificates copies of positive covenants taken from transfers has been fully maintained.

The Chief Land Registrar recalls that at the Surrey inquiry an estimate that the extension of compulsory registration to that county would produce an additional 8,000 first registrations in a full year was discussed and thought in some quarters to be excessive. In fact, in the nine and a half months following March 15, 1952, when compulsion began to operate, no fewer than 10,763 applications for first registration of Surrey titles were lodged. Additional staff was recruited and trained to meet this unexpected situation and, by means of long hours of overtime work, the Registry was able to deal with 28,425 first registrations from all areas by the end of the financial year (against 21,384 in the year 1951, an increase of just over 7,000). The average time taken to complete applications for first registration in the compulsory areas, which were deliberately given a measure of priority, was only 16½ days (against 18 in the year 1951), and absolute or good leasehold title was granted in over 99 per cent. of the titles examined. In non-compulsory areas where, in the nature of things, there is a tendency on the part of landowners to submit weak and defective titles to the curative process of voluntary registration, it was possible to grant absolute or good leasehold title in 92 per cent. of the applications made and the average period taken to deal with them was 26 days (against 22). For the benefit of those who like statistics, the Chief Land Registrar has included in his report analytical tables of these and other results of the year's work which contain information of a kind not published on previous occasions.

Since the days when Hitler's bombs were hurled upon London and other cities, the Registry has served a most useful function in re-establishing title through registration in cases where the title deeds were damaged or entirely destroyed, so improving the marketability of the land. Applications of this character continue to be made, and during 1952, absolute or good leasehold title was granted in 95 out of 111 such instances. Damage caused to title deeds in the flood disasters earlier this year is now giving rise to applications for first registration which, says the Report, "are examined with the same sympathetic consideration accorded to enemy action cases and are registered with the best title that can be justified having regard to all the facts of the case."

Readers will recall that as a result of suggestions made at the Surrey inquiry an Advisory Committee, comprising practitioners and representatives of the Land Registry, was formed with the intention that it should meet to discuss difficulties which might arise from time to time and to find remedies for them. We are told that this Committee met rather more than a year ago and examined

the organisation and working methods of the Registry in some detail. It is perhaps not without significance that no changes were then suggested. Since the Report was written there has been a further meeting at which the Chief Land Registrar answered a number of questions on practice and procedure. It is understood that a summary of his replies may later be published by the Law Society.

T. B. F. R.

Extention of Compulsory Registration to Oxford

An Order in Council, the Registration of Title (City of Oxford) Order, 1953 (S.I. 1953, No. 881), under section 120 of the Land Registration Act, 1925, has been made at the instance of the Council of the City of Oxford declaring that on and after March 1, 1954, registration of title to land is to be compulsory on sale in the County Borough of the City of Oxford. The effect of the Order is that after February, 1954, conveyances on sale of freehold land, leases for not less than 40 years and assignments on sale of leasehold land having not less than 40 years to run must be registered within two months from the date of the particular instrument.

THE LAW SOCIETY'S NEW CONDITIONS OF SALE

By E. O. Walford, ll.d., Solicitor

The work of a commentator on the new edition of the Conditions of Sale of the Law Society is considerably lightened by the excellent Explanatory Notes issued with those Conditions. Permission has kindly been given by the Council of the Law Society to effect in this article a limited reproduction of those notes, and, although the reproduction is negligible, that permission is gratefully acknowledged. It should, however, be emphasised that practitioners using the new edition should study carefully the Explanatory Notes, and that whilst certain major points have been selected for mention or discussion here, it would be quite unsafe to neglect the perusal of the official Explanatory Notes above mentioned before settling the Special Conditions.

PRINCIPAL CHANGES

Exchange of Contracts before Searches

There is no doubt that the most revolutionary of the new Conditions is No. 21. In the words of the Explanatory Notes, "Its purpose is to provide a method, *for use where desired*, of expediting the signing of contracts for the sale of land by relegating the making of searches and local authority inquiries to the period between contract and completion." At this stage it should be said that in order to follow more readily the ensuing observations it will be desirable for the reader to have before him a copy of the new General Conditions of Sale, 1953, and of the new form of Particulars, Special Conditions and Contract. Returning to Condition 21, the most important point to note is that if a Special Condition incorporating it is not inserted in the Form of Particulars, Special Conditions and Contract that Condition will not apply. In order that this fact may not be overlooked there is a blank paragraph numbered 10 in the last-mentioned form, with a footnote containing the words which should be inserted if Condition 21 is to apply. Some may think that it is unfortunate that the Special Condition is not printed in that paragraph, as it seems probable that, except in the very rare cases where the vendor's solicitor has been instructed to incorporate Condition 21, he will deem it his duty to avoid its incorporation by the simple course of striking out the figure 10 and the reference to

footnote (*h*). What the purchaser's solicitor will then do depends, inter alia, upon the circumstances and his personal view concerning the desirability that Condition 21 should normally be incorporated. He will also need to consider whether the protection afforded by that Condition is sufficient to justify the exchange of contracts without making the usual pre-contract inquiries and searches with the usual local authorities. Practitioners having any considerable experience in conveyancing will know that one does sometimes receive in answer to the usual pre-contract inquiries information concerning contemplated steps which are not yet due for entry in any register. Nevertheless the list of matters set forth in Condition 21 (3) and the existence of which will enable the purchaser to rescind the contract, if he did not receive notice in writing thereof before the contract was made, is very imposing. However, assuming that Condition 21 is incorporated, it seems that there are considerable possibilities of argument concerning the meaning of certain paragraphs contained in Condition 21 (3), *e.g.*, " any notice relating to any proposed or intended requisition or compulsory acquisition *or the acquisition of powers therefor*," including argument whether such notice was in fact given to the vendor. The words within quotation marks were no doubt inserted to meet the decision in *Provincial Cinematograph Theatres* v. *Campbell*, 1 P. & C.R. 36; [1949] C.L.Y. 4125. These observations are not intended as a criticism of the Condition which is most ably drawn, but rather as an indication that it must not be assumed—and it certainly has not been assumed by the draftsman of the Conditions or by the Law Society—that it will always be safe for a purchaser to omit pre-contract local authority inquiries and searches if Condition 21 is incorporated. In a case where it is essential that contracts be exchanged at once and the vendor is willing to incorporate Condition 21, it is perhaps fair to say that the purchaser should be advised that practically all the important matters which bear on the value of the property appear to be covered by Condition 21, and that under it the purchaser will be able to rescind if any such matter is discovered before completion; but that it is impossible to say with certainty that the purchaser will be in as safe a position as he would have been if the usual inquiries and searches had been made before exchange of contracts.

As the Law Society has to a certain degree countenanced Condition 21, it may be thought by some practitioners that it should have been indicated whether, in the opinion of the Council, it should normally be adopted, *i.e.*, as a standard condition to be inserted in the absence of special circumstances. It is respectfully

submitted that, unless the case could be put as high as that, solicitors acting for vendors are unlikely to accede with readiness to the incorporation of a Condition which renders it impossible for the vendor to be as sure that the contract is enforceable as he would have been if that Condition had been omitted, or that litigation will not result from some dispute concerning the applicability or effect of one of the paragraphs (a) to (h), of sub-clause (3) of that Condition.

The statement in the Explanatory Notes that "it is obvious that there will be many cases in which this procedure will be inappropriate" seems to provide a vendor's solicitor with a ready-made objection to the Condition, and the words, "but in cases where both parties would welcome such an arrangement the new Condition may be found helpful," enable the vendor's solicitor to argue that the purchaser should not press for the incorporation of the Condition, as the vendor does not welcome its incorporation.

Condition 21 is not expressed to operate without prejudice to the right of the purchaser to rescind on any other ground, but it is thought that words to that effect are unnecessary, as the Condition is made applicable only to certain specific matters, and is clearly not intended to extend to cases of fraud, misrepresentation or the like. As to misdescription see Conditions 34 and 35.

Omission of Condition 21

It will be seen from footnote (*h*) to Special Condition 10 that if Condition 21 is incorporated it takes effect in substitution for Condition 20 (3). It will be recalled that under the previous Law Society's Conditions the purchaser was not left without protection of any kind. A detailed analysis of the former Condition 20 and the changes effected by the new Condition would occupy a disproportionate amount of space and it must suffice to say that the old Condition 20 (3) has been omitted, and that the old Condition 20 (4) has been redrawn and extended so as to include land charges, other than local land charges (to which Condition 20 (1) applies), supervision orders and notices relating to requisitioning and compulsory acquisition.

In a footnote to Special Condition 11, which provides for the insertion of details of special matters not elsewhere mentioned in the Particulars or Conditions, attention is drawn to the necessity for specifying any matters mentioned in Condition 20 (3) or Condition 21 in respect of which it is desired to exclude the power of rescission under either of those Conditions.

Other Alternative Conditions

Opinions may differ concerning the question whether the right to compensation should be given to a purchaser where an incorrect statement materially affects the description of the property; but it is undoubtedly unusual in modern conditions to provide for compensation after completion.

The vendor's solicitor, when drawing the Special Conditions, will have to decide whether Condition 34 is to stand, as it will if he does not otherwise provide, or whether Condition 35 is to be incorporated, in which latter event no error, omission or misstatement will annul the contract or entitle the purchaser to be discharged from his purchase whether the description of the property is thereby materially affected or not; but whether Condition 34 or Condition 35 is adopted, the following proviso is applicable, namely, that if the error, omission or misdescription is such that the property available for conveyance differs substantially from the property agreed to be sold whether in quantity, quality, tenure or otherwise, neither the vendor nor the purchaser can be compelled to proceed to completion if he would be prejudiced by reason of such difference.

It will be seen that an important distinction is taken between cases where the property is or is not "materially" affected, in which case compensation may be payable if Condition 34 is adopted, (but not if Condition 35 is adopted), and more radical mistakes which cause the property to differ "substantially" from that agreed to be sold, in which event a vendor or purchaser who would be prejudiced by such "substantial" difference can refuse to proceed to completion. As the former General Condition (then No. 31) made the same distinction with the omission of any reference to the prejudicial effect upon either party, lengthy comment would be out of place here. Obviously borderline cases may arise; but the broad test is whether the misdescription or misrepresentation is of so essential a nature that the property to which title is shown is not substantially what the vendor had agreed to sell to the purchaser. It is doubtful if the Condition in question does more than state the position at common law, apart from the words requiring that the party rescinding must show that by reason of the error, omission or misstatement he would be prejudiced if required to take or convey what the vendor in fact has power to convey, or, in the case of rescission by the vendor, what he has mistakenly included in the contract. It would seem to the present writer that it would not be necessary for a vendor to show that the mistake was mutual in order to claim the benefit of the right of rescission in the last-mentioned

case. Presumably the intention is to give effect to the equitable rule that where specific performance would inflict very considerable hardship on the vendor owing to a mistake which he has made in describing the subject-matter of the sale the court will not decree specific performance. There are a number of decisions which illustrate that rule, such as *Durham* v. *Legard* (1865) 34 Beav. 611, where the acreage of the land was described in error as 21,750 acres instead of half that acreage. The court refused to decree specific performance with a proportionate abatement. *Baxendale* v. *Seale* (1854) 19 Beav. 601, *Hexter* v. *Pearce* [1900] 1 Ch. 341 and *Rudd* v. *Lascelles* [1900] 1 Ch. 815 furnish further examples of the application of this rule. It seems, however, that a purchaser is entitled under an open contract to a decree of specific performance on payment of the purchase price (*i.e.*, without abatement) if prepared to take what the vendor meant to sell or to pay the price which the vendor intended to insert in the contract: see Williams on Vendor and Purchaser, 4th ed., p. 726, footnote (*r*), and it is submitted that under the Law Society's General Conditions (where there is such a "substantial" difference as above mentioned) the position would be similar in that respect. Under the previous Conditions there was room for argument that the position would have been otherwise.

Town and Country Planning

In view of the substantial explanation in paragraph 2 of the changes made in the new Conditions and the mention in that paragraph of the more important of the matters relating to Town and Country Planning which may require consideration on a sale, it is thought unnecessary here to do more than call attention to that note, and to suggest that practitioners should forthwith obtain and peruse the White Paper, Command 8699, which is mentioned in that paragraph if they have not already obtained a copy.

Resale on Default

As the intention is to give prominence to the most important changes in the first part of this article, attention is drawn to the remarks on page 2 of the Explanatory Notes concerning the changes made in the former Condition 32 (now 36) under the headings "Resale on Default" and "Liability of Defaulting Purchaser." It will be necessary to comment on the last-mentioned provisions later; but the above remarks will at least serve to draw attention to the major changes effected by the new Conditions. We may now consider the Conditions in numerical order in so far as comment appears to be necessary or useful.

CONDITION 1

(Reserve Price)

Section 5 of the Sale of Land by Auction Act, 1867, required that Particulars or Conditions of Sale by auction of any land should state whether the land would be sold without reserve or subject to a reserve price or whether a right to bid was reserved. Condition 1 (2) of the 1934 Conditions (including the 1949 Revision) reserved to the vendor the *right* to fix a reserve price but did not state whether the property would or would not be sold subject to a reserve price. Counsel having advised that in this respect the Law Society's Conditions (and incidentally the National Conditions of Sale) were defective, it was announced in the Law Society's Gazette for November, 1951, at p. 444, that in the next edition of the Law Society's General Conditions of Sale, clause 1 would read " Unless otherwise provided in the Particulars or Special Conditions the sale is subject to a reserve price for the property, and, where the property is sold in lots, for each lot."

It will be found that that provision now appears as Condition 1 (3) of the General Conditions.

As it is intended to make observations only upon such revisions as justify comment we can pass now to Condition 4 (3).

CONDITION 4 (3)

(Deposit)

It is very disappointing to find that Condition 4 (3) has been altered so as to provide that in cases where the vendor is in a fiduciary capacity or is selling as tenant for life under the Settled Land Acts the solicitors or auctioneers are to take the deposit as agents for the fiduciary vendor or Settled Land Act trustees. The result is that if, say, a single individual being a personal representative and a man of straw is the vendor, he can call for the deposit and spend it. The present writer has no hesitation in saying that this change is most undesirable. In permitting the deposit to be paid to a solicitor or auctioneer of good repute fiduciary vendors are following the ordinary course of business and have been held to be justified in doing so : *Edmonds* v. *Peake* (1843) 13 L.J.Ch. 13; 7 Beav. 239. When the second edition of the Law Society's Conditions of Sale was issued in 1934 that fact was appreciated and provision was made for payment of the deposit to stakeholders, without distinguishing between cases where the vendor was or was not in a fiduciary position. The undesirability of allowing a deposit

to be paid to a person as the vendor's agent and not as stakeholder is emphasised at p. 239 of Vol. 14 (3rd ed.) of the Encyclopaedia of Forms and Precedents: see also *Ellis* v. *Goulton* [1893] 1 Q.B. 350 (as to the position of a purchaser who pays a deposit to the vendor's agent as such and not as stakeholder); Williams on Vendor and Purchaser, 4th ed., p. 326 and footnote (*u*); Williams on Title, pp. 65, 66; 71 L.J.(Newspaper) 162, 180. Practitioners are now placed in the position that they should normally insert a special condition providing that the deposit shall be held by the vendor's solicitor(s) as stakeholder(s) where the sale is by a tenant for life, personal representative(s) or trustee(s) in order to avoid conflict between the General Conditions and a receipt given by the auctioneer or vendor's solicitor as stakeholder. Moreover, the new form of Condition with alternative forms of receipt on the Memorandum of the Contract will presumably lead to the old argument (which was quite incorrect and was partially dispelled by the 1934 Conditions), that the deposit *must* be paid to the recipient as vendor's agent and not as stakeholder. The National Conditions have, at any rate until recently, preserved throughout numerous editions provisions for payment either to a stakeholder or agent for the vendor or Settled Land Act trustees of the vendor; but there is no general condition *requiring* that the deposit be paid to the recipient as agent for the vendor or Settled Land Act Trustees.

CONDITION 4 (4)

(TIME OF EXCHANGE OF CONTRACT)

This is a new and useful Condition which is intended to provide a means of determining with certainty the time when there is a binding contract between the parties: see in this connection *Eccles* v. *Bryant* [1948] Ch. 93, at pp. 98, 99, 107 and 108. The contract is now to be deemed to have been made when both or all of the parts have been exchanged; and if a part is dispatched by post it is to be deemed to be exchanged when actually delivered at the premises of the person or firm to whom it is addressed. The Condition does not specify that the person or firm should be one of the parties to the contract or that party's solicitor(s), or if so which party or solicitor(s), and it is possible that difficult questions may arise out of Condition 4 (4) under certain conditions; but for straightforward cases this Condition in its new form is an improvement on the former Condition.

CONDITION 5 (2)

(Place of Completion)

As previously, the vendor can require that completion should take place at the office of the solicitors of the vendor or of his mortgagee, and if there are no such solicitors the vendor can insist on completion anywhere in England and Wales. Whilst the last-mentioned provision probably represents the general law, it seems to the present writer that it is unreasonable to require completion of the purchase more than say 10 miles from the property which is being sold unless the vendor is prepared to meet the additional expense. It is not infrequent that a vendor of a house 100 to 200 or more miles from London has London solicitors, and if the Conditions are not altered the purchaser has either to employ London solicitors or pay the expenses of his local solicitors' visits to London to complete the purchase of a house in, say, Wiltshire or Cornwall.

CONDITION 6 (1) (a)

(Position of Occupying Purchaser)

It would seem that the statement in this Condition that a purchaser occupying the property before completion does so as licensee of the vendor is intended to prevent the purchaser from becoming a tenant of the vendor and thus obtaining, in certain cases, protection under the Rent Acts, *despite his failure to complete the purchase*: see *Francis Jackson Developments, Ltd.* v. *Stamp* [1943] 2 All E.R. 601; *cf. Dunthorne* v. *Wiggins* [1943] 2 All E.R. 678, where a different scheme prevented that situation from arising.

CONDITION 6 (1) (c) (iv)

(Interest During Possession)

The above paragraph requires a purchaser who has been let into possession to pay (in addition to outgoings) interest at the rate which would be applicable if Condition 7 (1) applied, *i.e.*, at 5 per cent. per annum or such other rate as is specified in the Special Conditions. Five per cent. seems quite reasonable under present circumstances unless the net yield or total net annual value of the property is (as it may be) substantially in excess of that rate.

CONDITION 6 (2)

(Tenant Purchasers)

There would appear to be some room for doubt whether, in the absence of express stipulation, a contract by a tenant to purchase his landlord's interest may operate as an implied surrender, from that moment, of the tenancy. The new Condition 6 (2) expressly declares that the contract shall not determine or affect the tenant's lease or tenancy. For an explanation of the resultant position in such a case under the new Conditions see paragraph 18 of the Law Society's Explanatory Notes.

CONDITION 7

(Interest after Completion Date)

If the purchaser can show such default on the vendor's part in deducing title or as otherwise specified in Condition 7 (2) he will not be liable for interest after the date fixed for completion so long as that default continues (unless he is in possession under Condition 6 (1)). It is, however, often very difficult to establish such default (although the time for completion has passed without any fault on the part of the purchaser), and it is not unusual for the purchaser's solicitor to stipulate that no interest shall be payable unless the delay in completion is due to the purchaser's default, thus throwing on the vendor the onus of proving that the purchaser is the person delaying the completion. There is a great deal to be said for that alternative; but even if there is no such variation of the Law Society's Conditions, the General Condition 7 (1) provides that unless the delay in completion "is attributable solely to the purchaser's own act or default," the purchaser can after the completion date arrives deposit the balance of the purchase price at a bank and notify the vendor or his solicitors, and thus prevent interest from running against him.

Unless the vendor would be entitled to interest during any period following the date for completion he is not entitled to the benefit of the rent (less outgoings) thereafter, as he is entitled only to elect to take such rent *instead of* interest. This is made quite clear by Condition 7 (3). See also paragraph 20 of the above-mentioned Explanatory Notes, observing, however, that the last sentence of that paragraph is not accurate, as interest would be payable by the purchaser (although not in default) and the vendor could elect to take the net rents if delay in completion were not due to the vendor's default, as delimited by Condition 7 (2), *unless* the purchaser had

effected such deposit of the balance of the purchase price as above mentioned. The test whether the vendor is entitled to elect to take the rents is whether he would be entitled to interest, and not simply whether the purchaser is in default as stated in paragraph 20 of the Explanatory Notes.

CONDITION 10

(Rescission by Vendor)

Under the previous General Conditions the vendor could rescind if compliance with a requisition was persisted in, and the vendor was unable to comply with it or could only do so with difficulty, delay or unreasonable expense. Under the new Condition 10 (1) the vendor can rescind only on the ground of inability or unreasonable expense. Whilst there is much to be said for the omission of the word "difficulty" it is submitted that there is less to be said for the withdrawal of the right to rescind on the ground of delay, or at any rate of considerable delay. Until a satisfactory explanation is forthcoming it is suggested that many practitioners would think it right to provide by special condition for the addition of "considerable" or "very substantial" delay or possibly "unreasonable delay" to the grounds upon which a vendor can rescind. After all, it is the duty of the vendor's solicitor to protect him from having his property sterilised for any considerable period if possible; and where there is a technical but not over-serious defect in the title the vendor may reasonably expect to be able to call the deal off and to provide in any new contract that there shall be no objection to the title on the ground of that technical defect.

On the other hand the purchaser is placed by the concluding part of the Condition in a difficulty by reason of the fact that, even if he rightly takes proceedings on account of a defect in title, the vendor can by rescinding render the proceedings nugatory: *Duddell* v. *Simpson* (1866) 2 Ch.D. 102. The court may, however, award the costs of the proceedings up to the date of the notice of rescission to the purchaser in a proper case: *ibid.* and see *Re Spindler and Mear* [1901] 1 Ch. 908.

On the whole this Condition seems reasonable, as in addition to the points just mentioned it has been held that the vendor cannot exercise the right of rescission "notwithstanding intermediate litigation" after judgment: *Re Arbib and Class* [1891] 1 Ch. 601, or possibly after putting in a defence to the purchaser's action: *Best* v. *Hamand* (1879) 12 Ch.D. 1, 6. The fact remains that if the vendor does lawfully rescind, the purchaser is precluded from recovering

the costs payable by him to his solicitor or any other expenses in which the abortive transaction has involved him: see Condition 10 (2).

CONDITION 12

(Rentcharges)

This relates to sales of rentcharges only. The effect of the revision is that if the deed creating the rentcharge is more than 30 years old the abstract will continue with a conveyance on sale or other disposition for value dated not less than 20 years before the date of the contract (instead of 30 years as previously provided by Condition 12 (1)).

CONDITION 13 (2)

(Enfranchised Land)

The reason for omitting the former Condition 13 (2) (c) concerning manorial incidents is made clear in the Explanatory Notes above mentioned.

CONDITION 14

(Leaseholds)

The Explanatory Notes refer practitioners to section 45 (2) of the Law of Property Act, 1925, which makes production of the last receipt for rent evidence of the performance and observance of the covenants and provisions of the lease unless the contrary appears; and no other provision is made by the General Conditions. Condition 14 (7) is new and requires special mention. The practical effect is that the purchaser's solicitor should now qualify the covenants implied by an assignment by the vendor "as beneficial owner" by excluding any covenant that the repairing covenants have been performed. Whether the practitioner should go further and should in a special condition provide for the exclusion of any representation or covenant that the other covenants have been performed is a matter for consideration by individual practitioners. As to the qualification of the implied covenant in respect of the performance of repairing covenants an appropriate wording was suggested by the court in *Butler* v. *Mountview Estates, Ltd.* [1951] 2 K.B. 563. There has already been published in the Supplement to the Encyclopaedia of Forms (3rd ed.) a form modifying the implied covenants to a certain extent (Supplement, 1953, p. 441); and see another form in *The Conveyancer*, Vol. 15 (1951) at p. 526, which extends the purchaser's implied covenants.

CONDITION 19 (4)

(Redemption of Land Tax)

This paragraph entitles a purchaser who becomes liable to redeem land tax to require the vendor at his own expense to furnish any necessary information as to such land tax which is in the vendor's possession.

CONDITION 20 (1) & (2)

(Notices from Authorities)

The revision of this Condition is of importance, as it adds to the matters in respect of which the vendor is required to indemnify the purchaser, not only requirements (as heretofore) but " proposals or requests " made by or on behalf of any local or public authority before the contract is made where compliance would involve the expenditure of money, unless the sale is made subject thereto.

CONDITION 20 (3)

(Orders, etc., Served on Vendor)

Under the former Condition (numbered 20 (4)) where before the contract a closing order, demolition or clearance order had been served on the vendor under any Act relating to the housing of the working classes, the purchaser had the right, unless he had notice in writing of that order, to rescind the contract on discovering that such notice had been served. The new Condition 20 (4) goes further and gives to the purchaser, if he had no written notice of the matter in question, the right to rescind not only in the case above mentioned, but also where before contract—

(a) any land charge (other than a local land charge), affecting the property and not removable by the vendor before completion has been registered pursuant to the Land Charges Act, 1925, and has not been cancelled, or

(b) any supervision order under the Agriculture Act, 1947, and affecting the property has been notified in writing to the vendor, or

(c) any notice relating to any *proposed* or intended requisition or compulsory acquisition has been given in writing to the vendor : see *Provincial Cinematograph Theatres* v. *Campbell*, 1 P. & C.R. 36; [1949] C.L.Y. 4125.

As to closing orders, demolition or clearance orders, supervision orders or notices within paragraph (c) above, notification by

advertisement or affixation to the property is deemed to be sufficient notice for the purposes of this Condition.

Practitioners acting for vendors should presumably draw the attention of their clients to this Condition and should point out the necessity for disclosing any such matters. As some of the matters would not be revealed by searches, it will presumably not be incumbent on a solicitor acting for a vendor to make any search prior to contract in the absence of special instructions.

It should be mentioned that the only alternative to Condition 20 (3) last mentioned is the new Condition 21, and that if a vendor requires further protection it must be provided by Special Conditions.

(*To be continued*)

TRUSTEES' POWERS OF MAINTENANCE

By B. S. Ker, B.A., Cantab., Solicitor

Of section 31 of the Trustee Act, 1925 (which deals with trustees' powers of maintenance) Sir Raymond Evershed M.R. recently said: "The language . . . I confess, is by no means easy to follow, nor does it seem to me that the section has been put together in a way which makes the task of apprehending its effect as easy as might be" (*a*). This article attempts to review and interpret its main contents.

The sort of situation to which section 31 applies is one where a fund is given by deed or will to some person who is nevertheless not to receive it immediately but is first to await the happening of some event. A typical case is that of a legacy to an infant when he becomes 21. The donor or the infant may both, at different times, wish to know, and certainly the draftsman who is drawing the will or settlement concerned and the solicitor who is later asked to advise on its effect *should* know, whether the infant may be maintained out of the income (if any) of the fund.

The possible situations are of course various: the gift may be by deed or by will, vested or contingent, specific or residuary, real or personal. This article, however, will examine section 31 mainly in its bearing on legacies, but will, in doing so, cover the principles generally.

Before examining the section it should be remembered that although some of the language used in it is peremptory it does in fact only give to trustees various *powers* (see *Re Turner's Will Trusts* [1933] Ch. 15). Accordingly, under section 69 (2) of the Trustee Act, 1925, section 31 must be read into every instrument creating a trust unless it is ousted or varied by a contrary intention.

Section 31 (1) reads: "Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting the property—

(i) during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any,

(*a*) *Re Vesty's Settlement* [1950] 2 All E.R. 891, at p. 897.

of the income of that property as may, in all the circumstances, be reasonable, whether or not there is—

(a) any other fund applicable to the same purpose; or

(b) any person bound by law to provide for his maintenance or education."

Although every part of this subsection is important, two points in particular about the wide powers given therein may be made here. The first is on the meaning of the word "trustees." Clearly it includes trustees of settled land under the Settled Land Act, 1925. Further, section 68 (17) of the Trustee Act, 1925, lays down that where the context admits "trustee" includes a personal representative; but it would appear from *Re Smith* (1889) 42 Ch.D. 302 (a decision on section 43 (1) of the Conveyancing Act, 1881, the ancestor of section 31 of the Trustee Act, 1925) that a personal representative does not become a trustee for the purpose of the application of section 31 until debts, duties and testamentary expenses have been paid and the residue ascertained.

The second point is that while subsection (1) gives these wide powers to trustees where the infant beneficiary's interest is either vested or contingent, subsection (3) nevertheless contains certain conditions precedent to the operation of the section where the interest is contingent. The draftsman of the Act could easily have given some warning of these by inserting in subsection (1) the words "subject to the provisions of subsection (3) hereof . . ." but he did not do so. The section therefore applies to all vested but only to *some* contingent interests.

Before dealing with subsection (3) it might help to consider the situation confronting a trustee holding property for an infant beneficiary. Suppose the gift is a large legacy of cash to X if and when he attains 21. The first question is, what income does the legacy earn during X's infancy, *i.e.*, how much of the income of the legacy can lawfully be said to be available for the infant's benefit? "Available" is of course a neutral word. The appropriate term of art with reference to a fund created by will or arising on intestacy is "carrying interest," and with reference to a contingent gift by deed, "carrying intermediate income" (*b*).

(*b*) Both expressions in a general way mean the same thing. There is perhaps an historical reason for using "interest" with bequests. According to Vaughan Williams L.J. in *Re Bowlby* [1904] 2 Ch. 685, the common law viewed a father as responsible for maintaining his infant children; equity, to provide some fund for this purpose, adopted the course of allowing the gift by the father's will to "carry interest." This was supposed to accord with the father's presumed intention. Eve J., however, in *Re Abrahams* [1911] 1 Ch. 108, after reviewing the cases, said: ". . . the matter is left somewhat in doubt as to whether maintenance is allowed and treated as interest on the legacy, or whether interest is allowed and maintenance given thereout."

Section 31 (3) enacts: "This section applies in the case of a contingent interest only if the limitation or trust *carries the intermediate income* of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in *loco parentis* to, the legatee, if and for such period as, under the general law, the legacy *carries interest* for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of court to the contrary) be five pounds per centum per annum."

In other words before section 31 can apply to a contingent gift the gift must as a sort of condition precedent carry either intermediate income or interest. For this purpose subsection (3) seems to make a distinction between a "contingent interest" and a contingent legacy. Normally "contingent interest" is a wide enough term to include a contingent legacy, but from the wording here it would appear that the legislature is saying, "As to contingent interests the law is *this* but as to contingent legacies it is something else," implying that contingent legacies are not contingent interests in this context. Other differences in wording favour this construction. Thus "limitation or trust" are unusual words to apply to a legacy. Again, in connection with contingent interests the words "intermediate income" are used, while those used in connection with legacies are (the more usual ones in such a context) "carries interest." Lastly, in the case of contingent legacies only the rate of interest is 5 per cent. No rate is specified for a legacy *not* given by a parent of, or person *in loco parentis* to, the legatee falling—if it does so fall—within the term "contingent interest." This might suggest that such a legacy is not contemplated as falling within it.

Against these contentions is the argument that the latter part of subsection (3) does not exclude contingent legacies from "contingent interests" but merely emphasises one particular facet of the law of maintenance of infants. It is not unimportant to know which of these contentions is right for reasons which will appear by and by. There seems, however, to be no reported decision of the point, and we will defer our own conclusion until later.

When a Gift Carries the Intermediate Income

The question now arises as to when a "limitation or trust" carries the intermediate income of the property. The rules are as follows:—

1. A contingent gift by will of *residuary* personalty carries with it all the income it earns from the testator's death, for the simple reason that there is no one besides the residuary legatee to whom

it could go. North J. said in *Re Adams* [1893] 1 Ch. 329, at p. 334, "Here no child has [a vested interest in the residue]. How does the matter stand as to the income? It is said that they take an interest in that also. I think it is fallacious to say that they take an interest in the income, *qua* income of the capital they take an interest in. *But it is undisposed-of income, and as such becomes part of the residue*; but, being part of the residue, the income belongs contingently to the children, in the same way as the capital belongs contingently to them." If this income is accumulated until the contingency vesting the money in the beneficiaries happens the rules in sections 164–166 of the Law of Property Act, 1925, must be observed. (See *Bective* v. *Hodgson* (1864) 10 H.L. Cas. 656.)

2. The rule as to contingent *specific* gifts of personalty and contingent specific or residuary gifts of realty is contained in section 175 of the Law of Property Act, 1925: "A contingent or future specific devise or bequest of property, whether real or personal, and a contingent residuary devise of freehold land, and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the death of the testator, except so far as such income, or any part thereof, may be otherwise expressly disposed of." This section applies only to *wills* coming into operation after 1925, but it has been held in *Re Raine* [1929] 1 Ch. 716, not to apply to a pecuniary legacy. Further, it draws a distinction between "land" and "freehold land." This is because leaseholds rank as personal property and therefore the ordinary rules (*supra* and *infra*) as to the income of contingent gifts of personalty apply: see *Guthrie* v. *Walrond* (1883) 22 Ch.D. 573, and *Re Woodin* [1895] 2 Ch. 309, *per* Lindley L.J. and Kay L.J.

Pecuniary Legacies

3. In view of the decision in *Re Raine* (*supra*) the rules of the general law as to when contingent pecuniary legacies bear interest require examination. The broad rule is that no interest is payable on a contingent pecuniary legacy from the testator's death while the gift is in suspense (see *per* Kay L.J. in *Re George* (1877) 5 Ch.D. 837). There are, however, the following exceptions in which the legacy, subject to any contrary intention in the will, carries interest from the testator's death:

(a) *Where the testator was the father of, or in loco parentis to,*

the infant legatee. The idea is simple; a father is under an obligation to maintain his child and is therefore presumed to intend the income of the gift to be paid for his child's maintenance until the contingency happens. Although it is strictly an exception, we will refer to this rule hereafter for brevity's sake as "the golden rule." There are two exceptions to it.

First, it does not apply if the contingency is the attaining of some greater age than 21. In *Re Abrahams* [1911] 1 Ch. 108, the testator gave a legacy to X contingently on his attaining 25. The judge reasoned that the legacy had clearly not been deferred simply on account of infancy, or the age specified would have been 21. All idea of X's infancy was thus ousted and hence no intention to maintain could be presumed; hence no interest was payable towards X's maintenance.

The second exception is where the testator has provided another fund out of which the infant is to be maintained: *Re West* [1913] 2 Ch. 345. This is a clear intention which ousts the presumed intention underlying the rule.

Section 31 (1) (i) (a), however, might be thought to have altered this rule. We are considering the question, "Has the golden rule been ousted?" The old law said, "Yes, if another fund has been provided for maintenance." But this part of section 31 says that maintenance can be paid "whether or not there is another fund applicable to the same purpose." However, no part of the section applies to a contingent gift at all unless the requirements of subsection (3) are satisfied. Section 31 (1) (i) (a) therefore cannot come into play to oust the rule illustrated by *Re West* (*supra*). Thus, where a father gives a contingent legacy to his infant child and also provides another fund for his maintenance the legacy does not carry interest and therefore section 31 does not apply to it.

(b) *A contingent legacy to an infant carries interest from the date of death where the testator, without being a parent of, or in loco parentis to the infant legatee, nevertheless shows an intention that the infant is to be maintained.* In *Re Churchill* [1909] 2 Ch. 431 a testatrix gave a legacy to a grandnephew and directed the trustees at their discretion to pay any part, etc., of it, "towards the advancement in life *or otherwise for the benefit*" of the legatee. It was held that the legacy carried interest from the date of death at 4 per cent. (*c*).

(c) *Where the testator segregates a fund for a legatee but makes the gift contingent.* The idea here is that if the testator says "X

(*c*) See *Re Jones* [1932] 1 Ch. 108, where a contingent legacy was held to carry interest according to this principle in spite of the fact that the contingency was the attaining of an age greater than 21. (*Cf. Re Abrahams* (*supra*).)

is to have an ear-marked sum of £10,000 when he is 21 " and nothing more, he must obviously have intended him to have the accretions earned meanwhile. But there must be a segregation of the legacy required inherently in the nature of the legacy itself. Two examples will illustrate the point.

In *Re Judkin's Trusts* (1884) 25 Ch.D. 743, the testator, after making specific devises and legacies, gave all his property to his trustees on trust for sale and investment. Out of the proceeds they were first to pay debts, etc. Then, out of the residue they were to divide £1,500 between six people equally (if living at X's—another person's—death) on attaining 21 or marrying before. The rest they were to pay to A B absolutely after X's death. Thus, until X died nothing happened. But the question was, who was to have the income attributable to the sum of £1,500 earned meanwhile? A B as residuary legatee said it was hers, as anything not disposed of in the will must fall into residue. The testator's next-of-kin claimed that the income was undisposed-of residue and therefore theirs under the resulting partial intestacy. The six contingent legatees said it was theirs because the testator had segregated a fund for them. It was held that the intermediate income belonged to residue (*i.e.*, went to A B) because there was no real segregation within the rule. True, the £1,500 had to be separated from the rest of residue, but this was simply for the purpose of ascertaining *how much was left*, and not for a cause " connected with the legacy itself." Or, to put it another way, it had not been separated by the *testator* but by the *executors* (see *per* Eve J. in *Re Raine* (*supra*)). In reality no fund of £1,500 came into being until the contingency (X's death) happened. Therefore as the income could not be attributed to a non-existent fund it fell into residue. The case was different in *Re Medlock* (1886) 55 L.J.Ch. 738. Here the testator bequeathed £750 to trustees upon trust to pay and divide the same among three people contingently on their surviving him and attaining 21. If none got a vested interest the fund was to fall into residue. It was held that here a definite fund had been segregated by the will itself from the rest of the estate. The segregation was not, as in *Re Judkin's Trusts* (*supra*), a mere incident in the course of ascertaining the final residue. Any income accruing to the fund therefore could go towards the maintenance of the three infants.

Summarising, then: the three cases in which, apart from statute, contingent legacies carry interest from the date of death are—

(a) where the testator was the father of, or *in loco parentis* to, the legatee,

(b) where, without being either of the foregoing, the testator shows an intention to maintain (*Re Churchill* (*d*)), or

(c) where the testator has segregated the legacy for the legatee (*Re Medlock* (*supra*)).

It will be noticed that section 31 (3) of the Trustee Act, 1925, expressly mentions the rule in (a) only—the golden rule. Does it impliedly exclude the rules in (b) and (c), or does it merely single out that in (a) for the purpose of fixing interest at 5 per cent. per annum? If it excludes (b) and (c) then section 31 will not apply at all to cases of the *Re Churchill* and *Re Medlock* kinds and this would need to be borne in mind when considering, in particular, subsection (1) (ii) and (2). The arguments both ways have already been set out (p. 275, *ante*). It is submitted that the correct view is that subsection (3) does embrace the *Re Churchill* and *Re Medlock* types of case and that the specific mention of the rule in (a) above is only for the purpose of establishing a suitable rate of interest. The learned author of Williams on Wills (p. 803) seems to take this view.

Before leaving subsection (3) it may be worth noticing that while the rule—(a) above—of the general law is that the donor of the legacy must be the *father* of the legatee, the statute, in adopting the rule has used the word "parent" instead of father. At common law, of course, it is the father's duty to maintain his child—not the mother's unless she has deliberately taken upon herself a father's duty. Section 31 (3) may thus have enlarged the law here to cover a legacy by a mother not *in loco parentis*. However, the term "parent" would probably be held to mean "parent responsible in law for the children's maintenance" and thus refer only to the legatee's father, unless the mother had assumed the duty of maintenance.

Exercise of Discretion

We can now return to subsection (1) which, we have seen, gives trustees wide powers of maintenance. Omitting, for the moment, subparagraph (ii) thereof, we come to a proviso to the whole subsection, namely, "that, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid (*e*), the trustees shall have regard to the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes. . . ." Pausing here, it is

(*d*) *Ante*, p. 277.
(*e*) *i.e.*, for the infant's "maintenance, education or benefit."

submitted that in most cases these are sufficient general directions to the trustees as to the exercise of their powers, and that draftsmen would be wise to exclude the remainder of the proviso which continues: "and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied." In other words, the trustees of each fund would be obliged to agree together on what proportion of the income of each fund they would pay to the infant. The power only applies if they have notice of the income of the other funds being paid to the infant and then "so far as practicable," but not at all where (a) (*semble*) the trust instruments direct the entire income to be applied for the infant's maintenance, etc., or (b) the court directs otherwise.

Accumulation of Unapplied Income

Where trustees exercise their powers under section 31 and only apply part of the income for maintenance, subsection (2) deals with the residue of such income in their hands:

> "During the infancy of [the beneficiary], if his interest so long continues, the trustees shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorised investments, and shall hold those accumulations as follows:—
>
> (i) If any such person—
>
> (a) attains the age of 21 years, or marries under that age, and his interest in such income during his infancy or until his marriage is a vested interest; or
>
> (b) on attaining the age of 21 years or on marriage under that age becomes entitled to the property from which such income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest;
>
> the trustees shall hold the accumulations in trust for such person absolutely but without prejudice to any provision with respect thereto contained in any settlement by him made under any statutory powers during his infancy (*f*), and so that the receipt of such person after marriage, and though still an infant, shall be a good discharge."

(*f*) *i.e.*, under the Infant Settlements Act, 1855.

In short, the accumulations go to the beneficiary either at majority or on marriage during infancy where he had either a vested interest or an interest contingent on his attaining 21 or marrying before that age. "Authorised investments" means those authorised by law or the trust instrument: Trustee Act, 1925, s. 68 (1). The draftsman should therefore consider whether or not the trustees' powers of investment are wide enough in each case and enlarge them if need be.

> "(ii) In any other case the trustees shall, notwithstanding that [the beneficiary] had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes, and so that, if such property is settled land, such accumulations shall be held upon the same trusts as if the same were capital money arising therefrom; but (*g*) the trustees may, at any time during the infancy of such person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year."

This second part of subsection (2) covers any case, unless of course a contrary provision is made in the trust instrument, in which either payment of the fund or the vesting thereof is to take place at some time after the beneficiary has turned 21. If, therefore, the gift is contingent it will only be affected by this provision in the *Re Medlock* (*h*) or the *Re Jones* (*i*) type of case.

Thus, where there is a legacy to "X at 25," assuming it carries interest, its income can be applied for X's maintenance till he is 25. If between 21 and 25 all the income in one year is *not* paid to him it is accumulated and added to capital, but that accretion to capital can be resorted to in a later year (before X turns 25) in order to supplement his income if this should be necessary.

Miscellaneous

This is a suitable point at which to consider subsection (1) (ii), which is as follows: "If [the beneficiary] on attaining the age of 21 years has *not* a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his

(*g*) From here the words govern the whole of subsection (2).
(*h*) See *ante*, p. 278.
(*i*) See *ante*, p. 277, footnote (*c*).

interest." The purpose of this provision is that in a case where there is a gift (say) " to X at 25 "—assuming it carries intermediate income—the trustees, after X has turned 21, instead of merely paying the income to his parent or guardian or *for* his maintenance, etc., must pay it *to* him himself, as he is then competent to give them a valid receipt.

Subsection (4) enacts: " This section applies to a vested annuity in like manner as if the annuity were the income of property held by trustees in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant or his personal representatives absolutely." This in effect treats the annuity as a legacy payable in instalments and applies the section to it.

Finally, a matter which might usefully be dealt with here is the method of administering a gift to a class contingently on its members' attaining 21 or some other age. What happens is that as soon as a member attains the age specified the class is at that moment (at any rate provisionally (*k*)) regarded as closed and a notional allocation is made to each person in it, the one who has reached the age specified taking his vested share. The trustees may then maintain the infant members of the class out of the income attributable to their notional shares. If another member of the class is born later, the fund must be re-divided notionally among the infant members, who may then, as before, be maintained out of the income of their notional shares. This re-allocation happens every time either a member of the class attains the specified age or a new member is born: *Re King* (1928) 138 L.T. 641; *Re Jeffery* [1895] 2 Ch. 577.

Summary

(In each of the following cases X is an infant)

1. A specific pecuniary gift to X at a specified age

(a) If the gift, by deed or will, is vested section 31 will apply.

(b) If contingent, the gift must be made expressly to carry intermediate income unless the settlor or testator:

(i) is X's father or *in loco parentis* to him and the contingency is the attaining of 21 or marrying during infancy, or

(ii) shows an intention to maintain X, or

(iii) segregates the fund for X from the rest of the estate.

(*k*) The instrument creating the gift or a " rule of convenience " may direct that the class shall then be closed.

2. A specific gift of personalty (not a pecuniary gift) to X at a specified age

Section 31 will apply whether the gift is by deed or will, vested or contingent (*l*). The gift will of course need to be income producing.

3. A gift of residuary personalty (including leasehold property and money) to X at a specified age

Section 31 will apply whether the gift is made by deed or will, vested or contingent. (If it is contingent we have seen that it carries intermediate income (*ante*, pp. 275–6)).

4. A specific gift of realty to X at a specified age

(a) *By Deed.* If the gift is vested section 31 will apply. If contingent, section 31 will not apply unless the gift is made to carry intermediate income or falls within the categories in paragraph 1 (b) of this summary.

(b) *By Will.* Section 31 will apply whether the gift is vested or contingent (*l*).

5. Residuary devise of freehold land to X at a specified age

Section 31 will apply whether the devise is vested or contingent (*l*).

6. Residuary bequest of leasehold land to X at a specified age

Leaseholds rank as personalty. See therefore paragraph 3 of this summary.

7. Gift of residuary real and personal estate

(a) *Where vested.* Section 31 will apply.

(b) *Where contingent.* Section 31 will apply. Such a gift carries the intermediate rents and income: *Genery* v. *Fitzgerald* (1822) Jac. 468.

8. A gift to a class contingently on attaining 21 or a later age

Section 31 will apply if the gift carries the intermediate income or interest. In the following cases such income will be carried under the rules already considered:

(i) A specific gift of personalty.

(ii) A residuary gift of personalty.

(iii) A pecuniary legacy only if the testator is the father of the class or *in loco parentis* to it and the contingency is the attaining

(*l*) Section 175 of the Law of Property Act, 1925, applying to it.

of 21, or shows an intention to maintain, or segregates the fund for the class. Presumably if the class consists partly of children of a male testator and partly of other children to whom he is not *in loco parentis* only the testator's children will be maintainable out of the income attributable to their notional share.

(iv) A specific gift of realty.

(v) A residuary gift of realty.

9. A gift of an annuity to X at a specified age

Section 31 will only apply if the gift, either by deed or will, is vested.

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A LIMITATION ON THE DISCRETIONARY POWERS OF TRUSTEES

By A. Kiralfy, Barrister-at-Law

The increasing use of wide discretionary trusts has tended to create an impression that there is very little which cannot be decided by the trustees if the terms of the trust instrument are wide enough, but it might be truer to say that, although in fact much may be left to the trustees, certain important qualitative restrictions are imposed by equity quite independently of the expressed wishes of the settlor. Many of these can be explained as inherent in the nature of discretionary trusts or as implied by the settlor himself; it is only rarely that they rest on technical grounds, and contradict the explicit instructions of the settlor. Even in such cases, however, it is submitted that the true explanation lies in the nature of equitable jurisdiction as based on conscience, and is not inconsistent with the settlor's intentions. Settlors before the Statute of Uses of 1535 left their feoffees-to-uses complete common law dominion, but equity stepped in to correct abuses of the trust reposed in them. It is not enough that the settlor has created conditions in which the trustee may escape from liability for a breach of trust; equity will still see to it that wide discretionary powers are not abused. The control of the court may be tenuous but it is real. The court cannot exercise a personal discretion connected with a trustee's personality or experience, or substitute its mere opinion of the advisability of some step for the opinion of the trustees, but, if there are well-established objective canons of construction, on which the trustee cannot be so well informed as the court, the court will not permit a usurpation by the trustee, even under the terms of the trust, of jurisdiction to construe a trust document. Arbitration is based on contract and is not part of the law of property or wills. A beneficiary under a will may submit to the decision of a trustee on a point of construction, but does not submit merely because he is a beneficiary and the testator has directed the trustee's decision to be final. There may be legislative authority for such a decision in some cases, but the trustee has no general power to give such a decision.

The leading case in the law of wills is *Re Raven* [1915] 1 Ch. 673. In this case a testator left legacies, inter alia, to "The

National Association for the Prevention of Consumption." There was no association with this name but there were several possible claimants with very similar names. The will provided that " if any doubt shall arise in any case [as] to the identity of the institution intended to benefit, the question shall be decided by my trustees, whose decision shall be final and binding on all parties." Warrington J. held that the direction was void. He gave two grounds for this decision :—

(1) (p. 677) " It is contrary to public policy to attempt to deprive persons of their right of resorting to the ordinary tribunals for the purpose of establishing their legal rights." The learned judge conceded that a gift " to such charitable institutions as my trustees shall select " would be valid, but in the instant case the right did not depend on ascertainment by the method of selection but on direct identification by the settlor. In other words the decision shows that the trustees could exert no special personal influence on the destination of the funds except in so far as they came to a correct or incorrect ruling on the legal construction of the will. The settlor had not intended them to select one of several possible claimants, substituting their discretion for his own, but to pick the one which he intended, at the risk of the true legatee if they made a mistake. Such discretion as this gave the trustees was unintentional. This ground of the decision in *Re Raven* has recently been followed in *Re Wynn's Will Trusts* [1952] 1 All E.R. 341. In that case a will empowered the trustees to determine whether any moneys were to be considered as capital or income and to determine all questions arising in the execution of the trusts of the will, such decisions to be binding on all the beneficiaries. The trustee for sale (the Public Trustee) sold certain timber and, instead of capitalising three-fourths of the proceeds in accordance with the Settled Land Act, 1925, s. 66 (which applies to trusts for sale, in virtue of the Law of Property Act, 1925, s. 28), he treated the entire proceeds as capital. The Public Trustee applied to the court to be sure of his legal position. Danckwerts J. held that the trustees' power to decide such matters was void and contrary to public policy, as ousting the jurisdiction of the court. " It seems to me," he said, " that *Re Raven* is authority for the proposition that a testator cannot compel the beneficiaries taking under his will to have their rights decided by the trustees of the will." Counsel had pointed out (p. 345) that many collections of precedents of wills contained an empowering clause giving trustees or executors the power in question. Such clauses are obviously ineffective and should be avoided by draftsmen.

(2) The second ground for the decision in *Re Raven* was that it was repugnant to a legacy to give it to a legatee and then deprive him of the right to enforce it in the courts. This has less logic to commend it. The legacy is given *sub modo* and was intended by the testator to be conditional on a decision of the trustees. Professor Glanville Williams therefore considered that this ground of the decision was unconvincing ((1944) 60 L.Q.R. 82) since nothing could be repugnant which the testator explicitly directed. It is rather begging the question to speak of the legatee as being entitled to anything at all apart from the trustee's decision. Repugnancy generally refers to circumstances arising after the legacy vests, such as fetters on alienation. The argument that mere volunteers ought to take legacies on the terms prescribed by the testator was, however, again rejected in *Re Wynn*, *supra*. Since the main ground of *Re Raven* is the first ground, which rests on a principle of public policy, this second ground is unimportant in the result.

It will be noted that trustees brought no special expert knowledge to the decision as to the identity of the beneficiary in *Re Raven* or as to the decision as to what was properly capital or income in *Re Wynn*. The testator, in *Re Raven*, might well have given the trustees a discretion to give the trust fund to such institution treating consumption as they thought fit, and, in *Re Wynn*, to pay to a life tenant what was properly capital, to advance capital to a remainderman or to postpone conversion of wasting assets so as to increase income for the life tenant. But the provision would have been different in effect. Here a true element of discretion would have been introduced and the court would not have substituted its own opinion for that of the trustees. The rule in *Gisborne* v. *Gisborne* (1877) 2 A.C. 300 would then have applied. In that leading case the testator gave his trustees an absolute discretion to apply all or part of the income and they were willing to exercise this discretion. The House of Lords held that the court had no power to interfere. The trustees need not follow the principles on which the Chancery Division itself would have proceeded. To insist on that would have contradicted the testator's will, as he wanted the opinions of the trustees, and not of the court, on matters of family need.

Some obscurity has been introduced into the law by the reporting of the decision of the House of Lords in the Scots appeal in *Dundee General Hospital Board of Management* v. *Walker* [1952] 1 All E.R. 896. In that case a testator left a legacy to the Dundee Royal Infirmary provided the trustees of his will were

satisfied that the infirmary had not come under State control. Their Lordships held that the trustees might honestly have come to the conclusion, which they had, that the infirmary had come under State control. But this decision is one of Scots law only. The only relevant authority cited was *Low's Trustees* (1871) 8 Sc.L.R. 638; *Re Raven* was not cited. Lord Tucker, an English Lord of Appeal, states (p. 906): "No case has been cited in argument to show that the courts in Scotland will not give effect to such a clause as this." The noble and learned lord obviously did not wish to prejudice the position in English law, which is well settled. Although the Scots law of wills is often the same as the English this is not invariably the case. A useful illustration comes from this very field of public policy in conditions in wills. English law refuses to allow a condition referring to the acquisition of a peerage (*Egerton* v. *Earl Brownlow* (1853) 4 H.L.C. 1); Scots law regards it as perfectly valid (*Earl of Caithness* v. *Sinclair* 1912 S.C. 79). Thus it is submitted that on the facts of the *Dundee Case* the decision in English law would not be the same and that that case throws no doubt on the principle in *Re Raven*.

Some support for a contrary interpretation might be found in the decision in *Magee* v. *Magee* [1936] 3 All E.R. 15. That was a decision of the Privy Council in an appeal from the Court of Appeal of British Columbia. There was a trust to pay income "to such of my children from time to time as to my executors shall appear to be most in need." *Re Raven* was not cited. The criterion of need would enable a court to control the bona fides of the trustees, and there was a proper discretion reposed in the trustees based on their intimate knowledge of the family. Hence the case is distinguishable. In any case it may not be binding on an English court. Lord Russell held (p. 18): "The trustees have experienced no difficulty during a period of 18 years and down to the present time in estimating the varying needs of the different children, and their Lordships see no reason to suppose that they will experience any difficulty in appreciating the fact, if it ever comes about, that no child is in need of assistance." A warning note on assuming uniformity of law may be sounded by comparing the decision in *Re Jack's Estate* cited in the 1948 Supplement to the American Restatement of Trusts, p. 917. In that case the Californian Court of Appeals upheld the validity of a discretionary power conferred on trustees to determine whether any particular item should be charged against income or corpus (80 Cal.App. (2d) 562). In the absence of dishonesty or unreasonableness the Californian court refused to interfere with the trustees' discretion. This is exactly

opposite to the English decision in *Re Wynn, supra.* (California was originally a civil law jurisdiction but its law in such matters as this appears to be common law.)

Does a clause like that in *Re Raven* have any legal effect? Jarman (Wills (8th ed.), p. 913) suggests that a power to determine questions would be no protection to trustees, who, acting under it, decide a question of law wrongly, and that the clause is apt to mislead the trustees and should be omitted. W. J. Williams (Wills, p. 333 (n.)) suggests that trustees might be protected after they had acted, but this appears to assume that all interested parties are of full age and acquiesce in the decision. He recommends a clause as to obtaining counsel's opinion in all cases rather than a clause like that in *Re Raven.*

A trustee or personal representative has statutory authority for certain types of decisions under the Trustee Act, 1925, s. 15. Under this he may (inter alia) pay or allow any debt or claim on any evidence that he thinks sufficient (para. (c)) or compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust (para. (f)), without being responsible for any loss occasioned by any act or thing so done by him in good faith. It is conceived that this relates to administrative discretions of the trustee in dealing with persons outside the trust, and not with the relative interests of the beneficiaries *inter se.* In this connection it is interesting to see the distinction drawn between the administrative and dispositive discretions of trustees. This happy terminology is used by Professor Cheshire (Modern Real Property (6th ed.) p. 424). A clear example of an administrative discretion would be a discretion as to the range of investment of trust funds in the general interest and at the risk of all beneficiaries. On the other hand a dispositive discretion would include any power which alters the balance among the beneficiaries and includes such powers as powers of appointment, powers of maintenance and advancement, and discretionary and protective trusts. This dichotomy came under consideration in the recent decision of the Court of Appeal in *Re Downshire's Settled Estates* [1953] 1 All E.R. 103. The court acceded to a request to exercise its jurisdiction under the Trustee Act, 1925, s. 57, the Settled Land Act, 1925, s. 64, and its general equitable jurisdiction, to alter the terms of a trust for the common benefit of all the beneficiaries. The court distinguished between administrative powers and what I have termed dispositive powers and held that only the first could be conferred under the Trustee Act, while the wider wording of the Settled Land Act

permitted an alteration of the balance of beneficial interests if necessary for the benefit of the settled land itself. The court can also sanction any compromise arrived at among competing claimants to beneficial interests (though the problem of infants and persons yet unborn did not arise in the instant case). Powers similar to those exercised in the *Downshire Case* could presumably be conferred on trustees by a settlor, provided the test was the trustee's familiarity with the circumstances of the trust and not a general point of law.

Some administrative discretions come very close to dispositive discretions, *e.g.*, a discretion as to the postponement of conversion of trust property may merely be intended to simplify problems of administration, without prejudice to the ultimate adjustment of beneficial interests, or it may be conferred to favour the tenant for life or income beneficiary at the expense of the remainderman (Jarman, Wills (12th ed.) vol. 2, p. 1229). In either case there seems no objection to such a discretion but it falls to be governed by certain restrictions which will be referred to *infra* in dealing with discretionary trusts generally.

The power of appointment preceded the discretionary trust in point of time and has many close analogies with it. The very wide discretion of a donee of a general power may seem to present an instance inconsistent with the policy enunciated in *Re Raven*, but the discretion does refer to something personal to the donee. It makes his opinion the sole criterion of the selection of the object to be benefited, and prevents the court substituting its own. It will be remembered that Viscount Haldane said, in *Houston* v. *Burns* [1918] A.C. 337 (at p. 342) "My lords, by the law of Scotland, as by that of England, a testator can defeat the claim of those entitled by law in the absence of a valid will to succeed to the beneficial interest in his estate only if he has made a complete disposition of that beneficial interest. He cannot leave it to another person to make such a disposition for him, unless he has passed the beneficial interest to that person to dispose of as his own. He may, indeed, provide that a special class of persons, etc., are to take in such shares as a third person may determine, but that is only because he has disposed of the beneficial interest in favour of that class as his beneficiaries." This account does not refer to general powers but these are certainly not property, *e.g.*, their exercise may be made conditional on consent (a thing repugnant to the alienation of property) as is confirmed by the Law of Property Act, 1925, s. 159 (2). A general power may be made exercisable by will only, so that the donee cannot give himself an immediate fee

simple or absolute interest by appointing in his own favour (Jarman, *op. cit.*, pp. 793–4). If the donee dies intestate without exercising the power, or the appointments lapse, the fund subject to the power will devolve on the persons entitled in default of appointment, who may not be the same persons as those who succeed to the donee's own estate (*ibid.*, p. 817). In the same way the fund subject to the power is not assets for the donee's debts unless he exercises the power. The scope of judicial control of general powers is necessarily slight. The fact that the donee can appoint everything to himself puts him into a special position, like that of a trustee-beneficiary, and no abuse or fraud is possible, whatever he decides to do. He may, for example, take payment from an appointee as a consideration for an appointment to him, since the doctrine of frauds on powers has no application to the exercise of general powers.

In the case of special powers the control of the court is much more real, since the property may only be taken from the persons entitled in default of appointment in order to benefit third parties, not the donee of the power himself, and this is much closer to the character of a trust. In the so-called third class of powers the court has a limited control, *e.g.*, in a power to appoint to anyone but a professor, the court has jurisdiction to ascertain whether the appointee is in fact a professor (*cf. Re Jones* [1945] Ch. 105).

The discretionary trust confers very wide powers on trustees and confers no enforceable interests on any of the objects of the trust, but there are limitations of some practical importance even in this case. They are thus not in like case to *Re Raven*. Discretionary trusts may come under judicial control in various ways. The court may have to decide whether any binding trust was intended (*Lambe* v. *Eames* (1871) L.R. 6 Ch. 592; *Re Hill* [1923] 2 Ch. 259), whether the objects are sufficiently ascertained (*Re Sinclair* [1903] W.N. 113), and whether the trust is void for perpetuity (*Re Coleman* [1936] Ch. 528). The court may decide whether or not the trustee has bona fide considered the issue and exercised his discretion. Thus a mere failure to convert and realise trust assets is not enough to justify postponement of conversion; the trustee must show that he adverted to the matter and decided not to convert (*Re Hay* [1945] Ch. 294). Another good example is the case of *Klug* v. *Klug* [1918] 2 Ch. 67. Here trustees had power to advance a beneficiary out of capital. One trustee wished to accede to her request for an advancement; the other, out of proven spite, declined to concur. It was held that the court could interfere and direct the advancement to be made.

As Neville J. put it (p. 71), "What, then, ought the court to do when one trustee very properly desires to exercise his discretion under a power for the benefit of a beneficiary and his co-trustee will not exercise his discretion?" In a similar American case of a power of advancement Lummus J. stated (*Boyden* v. *Stevens* (1934) 285 Mass. 502, cited Scott's Cases on Trusts (1940), p. 502), "There is an implication, when even broad powers are conferred, that they are to be exercised with that soundness of judgment which follows from a due appreciation of trust responsibility. Prudence and reasonableness, not caprice or careless good nature, much less a desire on the part of the trustee to be relieved from trouble or from the possibility of making a foolish investment, furnish the standard of conduct." Uncertainty, it has been seen, may be fatal to a discretionary trust, and this is largely due to the absence of any means of judicial control where the court cannot discover who the possible objects are, so as to be able to guard against abuse of the powers of the trustee.

This point of uncertainty becomes very prominent in cases where the so-called trust is for vague non-charitable objects, and shows how real is the court's control of trusts, however wide the trustee's apparent discretion. Thus the leading case of *Morice* v. *Bishop of Durham* (1805) 10 Ves. 522 is explained by Gray on Perpetuities (4th ed., p. 768) as follows: "The objects of the trust were so indefinite that a court might well have considered that it could not in every instance determine whether a particular application by the trustee would be within the terms of the trust. This latter circumstance, standing alone, would render the trust invalid. There may, however, be cases where [there are no beneficiaries who can enforce the trust, yet] the objects of the trust are so definite that the court could determine whether or not these objects were being carried out." There is a similar statement, by Cozens-Hardy M.R. in *Re Davidson* [1909] 1 Ch. 567 (at p. 571): "In the present case the testator has created a trust but has not indicated any body of beneficiaries, any *cestuis que trust*, who can invoke the aid of the court and prevent the trustee from doing that which some trustees might do if there were no court to call them in question, namely, put the money in their own pockets." A charitable object is a matter on which clear rules of law exist. Where a patriotic purpose was held not to be a charity, in *Re Tetley* [1923] 1 Ch. 258, Russell J. pointed out: "It is sufficient to say that the court would have no means of judging in many cases whether the particular purpose or a patriotic object was or was not beneficial to the community and therefore charitable. It

could not effectively control the trustees in the administration of the trust." On the other hand a gift was made in *Re Thompson* [1934] Ch. 342 to be applied by the legatee " in such manner as he should in his absolute discretion think fit towards the promotion and furthering of fox-hunting." It was held that the gift did not fail for uncertainty, as the court could, if necessary, determine whether the testator's purpose was or was not being carried out by the legatee (*cf.* Gray on Perpetuities, 4th ed., pp. 780–1).

The court reads another limitation into gifts to persons or organisations with particular purposes, that their discretion is to be exercised in connection with those purposes. Thus in *Re Flinn* [1948] Ch. 241 a gift to the Roman Catholic Archbishop of Westminster " to be used by him for such purposes as he shall in his absolute discretion think fit " was read as a gift for religious charitable purposes, and in *Re Spensley* [1952] 2 All E.R. 49 a gift by will for such purposes as the National Trust should decide was held to be confined to purposes similar to those for which the National Trust was created. The alternative construction would generally mean a failure for uncertainty, or, occasionally, an absolute gift to the trustee.

The point decided on Scots law in the *Dundee Case*, *supra*, has come several times before an English court, and it has given decisions consistent with *Re Raven* though that case was not cited. In *Re Coxen* [1948] Ch. 747 a testator, by a codicil to his will, directed the trustees to permit his widow to reside in a house, limiting a gift over if, in the opinion of the trustees, she ceased permanently to reside there. No objection as to uncertainty applied, as permanent residence has a definite legal meaning. Jenkins J. (as he then was) did seem to assume that the trustees' discretion was valid (at p. 761) but it was not decisive in this case. In *Re Jones* [1953] 1 All E.R. 357 a trustee was empowered to forfeit a gift if the beneficiary had any social or other relationships with a named person " in the uncontrolled opinion of the trustees." It will be noted that in this case, as in *Re Coxen*, the trustees were to act as judges and not to exercise any special discretion. Danckwerts J. was able to hold this clause invalid for uncertainty and also held that the clause as to the trustees' opinion did not cure the uncertainty. Indeed otherwise the court would, as we have seen in other cases, have been unable to check the honesty of the exercise of the discretion, for want of any certain test. The learned judge pointed out that the trustee might fail to exercise his discretion, or might ask the court for a ruling and it would be unable to assist him. The *Dundee Case* was cited and distinguished, but

Danckwerts J. did not go so far as to doubt its authority in English law.

Even in the case of merely administrative discretions, where all beneficiaries stand equally to gain or lose, there is considerable judicial control. Thus powers indemnifying trustees from liability are generally read as ineffective to excuse wilful or dishonest breach of trust. Investment powers, however wide, are limited to what the court will admit to be technically investments (*Re Power* [1947] Ch. 572). The tendency to an over-strict construction of such powers seems to be reversed by the ruling of Jenkins J. in *Re Harari* [1949] 1 All E.R. at p. 432 in favour of a common-sense construction, though the learned judge gave full weight to the mass of authority limiting investment powers to the trustee range unless a contrary intention is very clear.

THE BINDING EFFECT OF COVENANTS IN LEASES FOR THE PAYMENT OF SUMS OF MONEY

By J. B. Sweetman, ll.b., Solicitor

Disputes on the question whether particular covenants by lessees can be enforced by the lessor against an assignee of the lease have been common since early days of law reporting, and, although Parliament has intervened to some extent at different stages, it is still mainly to the law reports that one must turn for guidance on the subject. That the result of research may be that confusion merely seems worse confounded is unfortunate but perhaps not surprising. If anyone doubts the difficulty of settling a dispute on a point of this nature, he would do well to refer to the judgment of Romer L.J. in *Grant* v. *Edmondson* [1931] 1 Ch. 1, a case which actually related to a covenant to pay a rentcharge : " . . . For in connection with the subject of covenants running with the land, it is impossible to reason by analogy. The established rules concerning it are purely arbitrary, and the distinctions, for the most part, quite illogical. . . . Apart, therefore from decisive authority one way or another, it seems to me that it is impossible to answer the question whether a covenant to pay runs with a rentcharge one way or the other. The question ' why should it? ' cannot be answered merely by reference to principles with any greater conviction than can the question ' why should it not? '."

The result is that one finds in the textbooks a long list of covenants which have been held to bind an assignee, and another list of covenants which have been held not to bind an assignee, and, unless the covenant which one is considering finds its exact equivalent in one or other of the lists, it is often a gamble whether it will or will not be held to bind the assignee. And yet there are rules of considerable antiquity, which are still said to be effective, to deal with the question. The covenant is only binding upon an assignee if it "*touches and concerns the thing demised*" (*Spencer's Case* (1583) 5 Co.Rep. 16a). But how difficult it is to interpret these rather vague words! The history of the subject is perhaps best dealt with in the judgment of Uthwatt J. in *Re Hunter's Lease* [1942] 1 All E.R. 27—the passages quoted refer to the burden of a lessor's covenant passing with the reversion, but the like considerations apply to the burden of a lessee's covenant passing with the lease—" . . . The question is whether the burden of that obligation

passes on the assignment of the reversion. The position at law, as I understand the matter, is this. At common law the assignee of a reversion is not liable to the tenant in respect of any of the covenants and conditions contained in the lease. That appears to be the orthodox view, and is so stated in 'Williams and Saunders.' In that state of circumstances, the statute, Grantees of Reversions and Lessees, 1540, provided, in substance, that the tenants were to have the like remedies on covenants and conditions contained in the lease against assignees of the reversion as they had against the original grantor of the lease." His Lordship referred to the provisions of the Conveyancing Act, 1881, which replaced the 1540 Act, and to section 142 (1) of the Law of Property Act, 1925, which in effect replaced the provisions of the 1881 Act, and pointed out that, although the later statutory provisions speak of "covenants with reference to the subject-matter of the lease," this had been held to have the same meaning as "touches or concerns the thing demised" (*Davis* v. *Town Properties Investment Corporation* [1903] 1 Ch. 797). One was left therefore with the old question whether the covenant in question "touched or concerned the thing demised," upon which there was a wealth of authority in the case of covenants entered into by tenants.

It would be out of place to attempt here a collection of authorities on particular covenants. The reader cannot do better than refer to Elphinstone on Covenants Affecting Land (pp. 31–40) for a comprehensive list, and he will also find on pp. 30–31 of that book an attempt to lay down certain grounds on which a covenant can definitely be said to bind an assignee of the lease (or the reversion, as the case may be). It is not thought, however, that these grounds are intended to be exhaustive; and they are considerably more complicated than the ground which is favoured by Dr. Cheshire in his Modern Real Property, 5th ed., pp. 214–5, which has received judicial approbation by the Court of Appeal in *Breams, Ltd.* v. *Stroulger* [1948] 2 K.B. 1, a case on the binding efficacy of a clause restricting the right of the landlords to give a notice to quit, in which Scott L.J. said :

"The phrase 'subject-matter of the lease' was, as we know, substituted for the ancient expression 'touching and concerning the land.' Professor Cheshire's elucidation of its meaning on pp. 214–5 of the 5th edition of his book on Modern Real Property, in my respectful opinion, supplies the true test. 'If a simple test,' he says, 'is desired for ascertaining into which category a covenant falls, it is suggested that the proper inquiry should be whether the covenant affects either the landlord qua landlord or the tenant

qua tenant. A covenant may very well have reference to the land, but, unless it is reasonably incident to the relation of landlord and tenant, it cannot be said to touch and concern the land so as to be capable of running therewith or with the reversion. Tested by this principle the following covenants have been held to touch and concern the land . . .' Of the covenants by the tenant running with the land that ' to pay rent or taxes ' and ' not to assign or underlet ' and by the landlord running with the reversion ' to renew the lease ' are the most apposite of the instances he quotes from decided cases. Although the case of a limitation upon, or condition precedent to a right to serve a notice to quit, does not appear to have been the subject of judicial decision, his principle that, if a covenant affects a landlord qua landlord, it must necessarily run with the reversion, appeals to me as a sound criterion. One object of that rule of law is to prevent just the sort of thing that was done in the present case."

It might appear from this that one may now, in effect, disregard both the old formula " touching and concerning " and the modern one " having reference to the subject-matter," if one can solve the problem whether the particular covenant affects the landlord qua landlord (or the tenant qua tenant, as the case may be). But that is not necessarily going to be a simple matter, and it is thought that attention will still have to be devoted to the old tests and the old decisions in most cases. It is interesting to note that in a recent case which came before the Court of Appeal, no reference was made to the suggested test laid down by Dr. Cheshire and supported by Scott L.J., and the old formula of " touching and concerning " was the one quoted for the decision (*Boyer* v. *Warbey* [1953] 1 All E.R. 269). The point at issue in this latter case was so typical of the cases on the question whether covenants in leases bind an assignee that it is of interest to study the decision in relation to the authorities to which reference is made in the judgments. The case involved a number of points, notably on the application and effect of the Rent Restriction Acts, but the facts relevant to the present issue were that a flat was let by a tenancy agreement in writing for a period of three years, and subsequently the term was assigned with the landlord's consent. By clause 2 of the tenancy agreement the tenant agreed in wide terms to keep the interior of the premises in as good repair and condition as the same were then in and so to leave them at the end of the tenancy. By clause 7 it was provided (in what the Master of the Rolls described as " the following obscure language ") as follows :

" Provided always and the tenant for herself and her assigns hereby agrees with the landlords and their assigns that she the

tenant will on her or their quitting the said premises at the end of the term hereby granted (and without prejudice to the provisions agreements and conditions hereinbefore contained) pay to the landlords or their assigns immediately after the expiration or determination of the tenancy whenever it shall happen the full sum of £40 towards the redecoration of the said suite of rooms or flat, which sum shall be accepted by the landlords in full satisfaction and discharge of all claims against the tenant for repairs to or decoration of the said premises subject to and without prejudice to the liability of the tenant to make good any damage caused by unfair wear and tear of the said premises."

There were several difficulties about the application of this clause—first, was it not repugnant to clause 2 which already provided for the tenant to repair; secondly, was it not a penalty which should not be enforced; and thirdly, did it "touch and concern" the thing demised so as to bind an assignee? The Court of Appeal found no insuperable difficulty in "sorting out" the provisions of the two clauses, with the help of the words "unfair wear and tear" in clause 7. Clause 2 left the tenant liable both for "fair" and "unfair" wear and tear; but clause 7, whilst preserving the tenant's liability for "unfair" wear and tear, released him from his liability for "fair" wear and tear in consideration of the payment of £40. On the second point, the sum of £40 was to be regarded as compounding the tenant's liability under a specific part of the repairing covenant, and, as it was not alleged to be extortionate, it was recoverable as such and was not a penalty. But it is the third point that is particularly of interest in the present context, and it was very concisely dealt with in the judgment of Denning L.J. (at p. 274) as follows :—

"The agreement to pay £40 does, in my opinion, touch and concern the thing demised. It concerns the redecoration of the flat. It is true that the landlords are not bound in law to apply the £40 towards redecoration, but they will, as a matter of practice, so apply it. The case falls within the authority of *Vernon* v. *Smith* (1821) 5 B. & Ald. 1, *Lord Howard de Walden* v. *Barber* (1903) 19 T.L.R. 183, and *Moss' Empires, Ltd.* v. *Olympia (Liverpool), Ltd.* [1939] 3 All E.R. 460."

Evershed M.R. dissented from the decision of Denning L.J. and Romer L.J. on certain grounds, but not on the "touching and concerning" point. He said as to this : "The law seems to be that a mere covenant by a lessee to pay a sum of money to the lessor will not prima facie 'touch and concern' the land, and therefore will not run with the land, but such a covenant may be part and

parcel of or bound up with other covenants, for example, a covenant to repair, so as to produce the opposite result. The covenants will then be ' inextricably bound together. . . .'

This is a statement based on *Vernon* v. *Smith*, *supra*, and the other cases referred to by Denning L.J., and it is important to note the circumstances under which a covenant to pay a sum of money (which would under normal circumstances be regarded as not " touching and concerning the thing demised ") becomes the sort of covenant which runs with the land. In *Vernon* v. *Smith* the covenant was to insure against fire and it was held that this ran with the land so as to pass to an assignee of the reversion *because* the provisions of 14 Geo. 3, c. 78 (the Fires Prevention (Metropolis) Act, 1774) had the effect of enabling the landlord to compel the laying out of the sum insured in rebuilding the premises, so that the effect was that of a covenant to lay out a sum in rebuilding or repairing the premises—clearly a covenant which would run with the land. Abbott C.J. expressly reserved the question whether a covenant to insure which did not fall within the limits of the 1774 Act would run with the land and Holroyd J. said the sum insured was not to be considered as a collateral sum, but as a sum which *by operation of law must be* laid out upon the premises. The decision is therefore very limited in its actual scope, and it is respectfully suggested that it is not an exact authority for the *Boyer* v. *Warbey* point. The only remarks of a generally applicable nature in *Vernon* v. *Smith* are certain *obiter dicta* of Best J. : " I think, also, that if the premises were in any other part of the kingdom, this would be a covenant that would pass to an assignee. A covenant in a lease which the covenantee cannot, after his assignment, take advantage of and which is beneficial to the assignee as such will go with the estate assigned. It is a covenant beneficial to the owner of the estate and to no one but the owner of the estate, and therefore may be said to be beneficial to the estate, and so directly within the principle on which covenants are made to run with the land." Best J. cited *Spencer's Case*, *supra*, as to covenants for renewal of a lease, which were beneficial to the owner and to no other person, and went on to say, " By the term ' collateral covenants ' which do not pass to the assignee are meant such as are beneficial to the lessor without regard to his continuing the owner of the estate."

In *Lord Howard de Walden* v. *Barber*, *supra*, there was a covenant to use premises as a private residential flat only, not to do or suffer anything to cause annoyance, nuisance or damage, and " that in case the said premises should be used as a brothel or

bagnio or as a disorderly house or for any immoral purpose, the lessee his executors administrators or assigns (without prejudice to the right of re-entry) should pay to the lessors the sum of £800 by way of liquidated damages for each and every case of such user, and not by way of penalty." The lessors sought to enforce the last provision against an assignee, and Wright J. said that, as to the covenant running with the land, it was a strong thing to hold that a covenant to pay damages could run with the land. It seemed to him that the only way to regard it was that the covenant was inserted for the express purpose of binding the assignee. It was not a separate provision, but an annexe to the general covenant. If it was treated as a buttress to the general covenant, there was no objection to treating it as running with the land, and the provision protecting the right of re-entry showed that view was correct.

This was perhaps a rather curious case. It is difficult to see how payment of the sum would result in any benefit to the demised premises or to the landlords qua landlords (except that it might deter the tenant or other tenants from pursuing similar activities). It is easier to follow the reasoning in *Moss' Empires, Ltd.* v. *Olympia (Liverpool), Ltd., supra.* In this case there was a lease with a covenant to repair and decorate and to expend during each year of the term on such repairs and decoration a sum of £500 and to produce to the lessors evidence of such expenditure or to pay to them at the end of each such year a sum equal to the difference between the amount so expended and £500, provided nevertheless that the expenditure and payment by the lessees of such sum of £500 per annum should be accepted by the lessors as full satisfaction of the covenants as to repair and decoration. The lease was assigned and it was alleged that the assignee had failed to expend £500 per annum on repairs or to pay the difference. The defence was threefold : (1) that under section 18 (1) of the Landlord and Tenant Act, 1927, damages are limited to the amount by which the value of the reversion is diminished by the breach; (2) that the sum of £500 was a penalty; and (3) that the covenant did not run with the demised premises. Lord Atkin set out the matter as follows :

" The Court of Appeal decided in favour of the defendants on the ground that they were protected by the terms of the Landlord and Tenant Act, 1927. My Lords, I think that the answer is that the defendants are not being sued for damages for breach of covenant to repair. They are being sued in debt on a covenant to pay a fixed sum of money. The covenants must no doubt be read together. So read they form part of a carefully devised and

co-ordinated arrangement by which in substance the liability of the tenant for repairs during the term is limited to £500 a year : which sum he has to pay whether repairs are necessary or not. . . . On the other hand, this is not a bare obligation to pay money which does not touch the thing demised. On the contrary, the performance of the repairing covenants and the obligations under clause vii are so inextricably bound together that it would be impossible to sever clause vii and treat it as a collateral promise to pay money . . . the lessor is provided with sums which if he chooses, he may apply towards meeting the obligation which he has assumed of performing structural repairs. In my opinion, the clause in question closely touches the thing demised, and runs with the land."

And Lord Porter agreed, saying : " This is not a bare or mere covenant to pay £500 or even to pay the difference between the sum spent and proved and £500. It is part of a number of covenants whereby the mutual obligations of landlord and tenant in repairing and redecorating the premises are fulfilled and is inextricably bound up with them. In my opinion it runs with the land."

The principle has progressed since *Vernon* v. *Smith*, *supra*, until it is no longer a question merely of a sum of money which can be *required* to be spent on the property; but there remains, besides the requirement that the covenant to pay shall be inextricably bound up with the repairing covenant (although it is not part of the repairing covenant within the meaning of the Landlord and Tenant Act, 1927), a suspicion of the old idea, seen in the reference by Lord Atkin to the fact that the lessor might, *if he chose*, apply the money towards meeting his own obligations as to repair of the premises, and the reference by Lord Porter to the *mutual* obligations of landlord and tenant in repairing and redecorating. It seems clear that the *Moss' Empires Case* is not an authority for saying that a covenant by a tenant to pay to the landlord a sum in lieu of repairs will run with the land unless the landlord has repairing obligations to fulfil, to which he will, in effect, apply the money, directly or indirectly. It remained to be seen whether the covenant, however bound up with the repairing covenant, would run with the land if the landlord had no repairing obligations whatsoever.

Re Hunter's Lease, *supra*, concerned a proviso in a lease for five years that at the end of the term the landlord should pay the sum of £500 to the tenant, provided that if the tenant acquiesced in non-payment of the sum, he could continue in occupation and the landlord should grant him a further term of five years.

Uthwatt J. said : " There is no doubt, to my mind, that, if the covenant in this case had been merely a covenant on the part of the landlord to pay a sum of £500 on the expiration or sooner determination of the lease, the burden of that covenant would not have fallen upon the assignee of the reversion. The interest included in the demise would not be affected by such a covenant. Valuable as it might be to the tenant, it would not in any sense touch or concern the interest which is the subject-matter of the lease. . . . [After referring to *Woodall* v. *Clifton* [1905] 2 Ch. 257, the learned judge continued :] One has, therefore, the authority of the Court of Appeal on two points—namely (i) that an option to purchase given to the tenant does not touch and concern the thing demised, and (ii) that the rule which treats as running with the lease the benefit of the covenant for renewal is difficult to justify. Returning to the particular covenant which I have to consider here, I think that the primary obligation is the obligation of the landlord to pay £500 on the expiration or determination of the lease. If he does not wish to pay it, and if the tenant acquiesces, the tenant may continue in possession and require a new lease. That is merely an alternative, however, and it needs the concurrence of both parties in order to bring the alternative into operation. Neither party can force upon the other a renewed tenancy. To hold that the burden of the covenant which is here in question runs with the reversion would be to extend the operation of the rule, stated by the Court of Appeal to be anomalous, that a covenant to renew touches and concerns the thing demised. I hold, therefore, that the defendant in this case, the assignee of the reversion, is not personally responsible for the payment of the sum of £500." The underlying principle seems to be that in this case the intention was not to benefit the tenant qua tenant, but to provide for payment of a totally unrelated sum, with a mere option to accept a benefit qua tenant in lieu of the payment.

The case of *Boyer* v. *Warbey*, *supra*, marks a further step in the progress of the rule in that there is no mention of any express obligation on the part of the landlord to do any repairs; but the money was to be paid at the end of the term for redecoration. As Denning L.J. pointed out : " When an outgoing tenant leaves the premises, he does not in practice do any decorative repairs even though the tenancy agreement says he should do. He usually pays the landlord an agreed sum instead of doing the decorations. This suits both sides. It suits the outgoing tenant because he avoids the cost of a survey to ascertain the dilapidations. It suits the landlord because he has to redecorate before a new tenant goes

in, and the sum will help towards the cost. Such being the practice, the parties in the present case simply agreed the sum in advance." In other words, the intention really was to benefit the landlord qua landlord.

It is still a little difficult to decide exactly how far the court is prepared to go in this direction. The first requisite to enforcement of a covenant to pay a sum of money against an assignee is clearly that it should be "inextricably bound up" with a covenant which does touch and concern the thing demised, *e.g.*, a repairing covenant or covenant for renewal. The second is more uncertain, but appears to concern the destination or object of the payment. If the money paid must be laid out on the premises, if the recipient is under obligation to lay out moneys on the premises, to the cost of which the payments are likely to contribute; or if the circumstances show that the payment is likely to be laid out on the premises as a matter of practice, it appears that the covenant will bind the assignee. On the other hand, if the payment is itself the primary object, and the provision affecting the premises themselves merely subsidiary or alternative, the covenant will not bind the assignee. The *De Walden Case* is peculiar because the breach of covenant was really an "irremediable" one, and there appeared to be no question of the moneys being likely to be laid out on the premises. Perhaps the decision indicates that in the case of the type of covenant affecting the premises, breaches of which are "irremediable," the test of likely application to the premises of the moneys payable is inappropriate and in this particular type of case it is enough that the landlords have suffered damage qua landlords, for which the payment will compensate them. But the cases which have been quoted can, it is thought, hardly be said to leave one in any great certainty of mind as to the exact form of the principle involved. The comments of Romer L.J. quoted at the commencement of this article remain highly apposite.

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

London Cemetery Co., Ltd. v. *Cundey* [1953] 1 W.L.R. 786; [1953] 2 All E.R. 257

Grave—exclusive right of burial only—liability for tree on grave —London Cemetery Act, 1836.—This case concerns the duties of those who buy a right of burial from a cemetery company. The defendants were the personal representatives of the owner of certain rights in a family grave which was situated in a graveyard owned by the plaintiffs, a corporation incorporated under the London Cemetery Act, 1836. The corporation were empowered to sell the exclusive right of burial in their land only, and were specifically forbidden to dispose of it any other way. On the grave in question was an elm tree which had died, and notice of this fact had been given to the defendants before the tree fell and damaged neighbouring gravestones. The corporation then sought to be indemnified by the defendants for the cost of repairing the damage.

McNair J. held that the corporation had no right to such indemnity. First, the defendants were under no general duty with regard to the tree, as on the authority of *R.* v. *St. Mary Abbot's Kensington* (1840) 12 A. & E. 824, they had no property or right in the land so as to impose on them the duties of possessors or occupiers. His Lordship dismissed the argument that on analogy to the law of easements there was an implied obligation to maintain the tree, and said that the proper law to apply to decide whether there was an implied obligation or not in cases such as this was the ordinary law of contract. McNair J. applied the test of Scrutton L.J. in *Re Comptoir Commercial Anversois & Power Son & Co.* [1920] 1 K.B. 868 at p. 899, and said, " Is the term, *i.e.,* that the grave owner should maintain the tree necessary to give such business efficacy to this transaction as both parties must have intended? " He held that it was not, and that as under section 17 of the statute, the corporation was liable to keep the place in repair, there was no reason why that position should be altered. In any event his Lordship said finally, if any such term were implied, involving as it did a positive burden on the grantee to whom no estate or interest in the land had passed, it was a mere personal covenant which could not pass in law to the grantee's assigns.

This decision runs on orthodox lines, and would appear to be the most satisfactory solution, for otherwise, as the learned Lord Justice observed, the burial rights would become a *hereditas damnosa* to the heirs of the grantee. Should we be grateful that no questions were raised in this case as to the duties in nuisance (if any) of irrevocable

licensees? This appears to be the most accurate description of the defendant's rights, though of course they were not licensees in actual occupation. It should be noted that *R.* v. *St. Mary Abbot's* (*supra*) is a case on rating only.

Re Adelphi Hotel (*Brighton*), *Ltd.* [1953] 1 W.L.R. 955; [1953] 2 All E.R. 498

Mortgage—costs.—Is a mortgagee entitled to be indemnified for his costs and expenses incurred in his dealings with the mortgaged property? Vaisey J. found that he had no such right in the absence of a clear stipulation to that effect in the mortgage.

A mortgagee bank, having obtained judgment to enforce its security, claimed to be indemnified against the whole of its costs as mortgagee, and argued that at least some of the items should be taxed either on an indemnity basis, or as between solicitor and own client, or at any rate as between solicitor and client. The mortgage in question was expressed to be a security for, inter alia, " all costs charges and expenses incurred or paid by the bank in relation to the negotiation for and preparation completion realisation and enforcement of " the mortgage.

The learned judge, dealing first with the general law applicable, said it was clear on the authority of *The Kestrel* (1866) L.R. 1 A. & E. 78 and *Re Queen's Hotel Co. Cardiff, Ltd.* [1900] 1 Ch. 792, that the costs of an action to enforce the mortgage security should be on a party and party basis. Nor could his Lordship see that any different basis should apply to the other costs and expenses of a mortgagee. He said that it was difficult to see why a mortgagor should be called upon to reimburse a mortgagee for anything beyond his necessary expenditure (see *Smith* v. *Buller* (1875) L.R. 19 Eq. 473 at p. 475). He thought that a mortgagee was entitled to his " full costs," but apart from a special bargain that meant merely ordinary party and party costs, and he disapproved of the statements in Halsbury, 2nd ed., Vol. 23, p. 404, and Butterworth's Costs (1951) at p. 70, to the effect that a mortgagee is entitled to be indemnified against all expenses.

His Lordship decided that the words in the mortgage deed in the present case could not operate to enlarge the usual right between the parties. *Malvern U. D. C.* v. *Malvern Link Gas Co.* (1900) 83 L.T. 326, where there was a very similar clause, concerned a contract for sale and not a mortgage. The learned judge appreciated that a mortgagee might well be surprised to learn that " full costs " did not cover every item on his solicitor's bill, but nevertheless if a mortgagee desired to depart from the well-established general rule, he must do so in plain and unequivocal language.

Simpson v. *Connolly* [1953] 1 W.L.R. 911; [1953] 2 All E.R. 474

Debt—discharge conditional on transfer of land—not a " sale " of land.—This case involved a new point of some interest: Finnemore J. decided that an agreement to extinguish an existing debt if some of the

debtor's land is transferred to the creditor, is not a contract for the sale of land.

The defendant debtor had suggested that his debt might be met by a transfer of a portion of his land, and the plaintiff creditor had agreed. The plaintiff had been let into possession of the land and had then asked the defendant to submit a draft contract, but the defendant took no further steps towards completing the agreement at all. After a delay of two years, the plaintiff brought proceedings to recover the debt. The defendant contended that the contract was one for the sale of land, which the plaintiff could not repudiate as he had never called for completion at any particular date, and he could not therefore sue for the money due. The plaintiff argued that the contract was not for the sale of land at all, but was an agreement which he could repudiate when the defendant had failed after a reasonable time to fulfil his part of the bargain.

The learned judge, after referring to section 205 (1) (xxiv) of the Law of Property Act, 1925, and remarking on the complete absence of authority, said that the general principle of English law in regard to sale is that it means the exchanging of property for money, and he came to the conclusion that the agreement in question was not a contract for the sale of land because it was not an agreement to hand over land in return for money. It was noted that the land in question had never been exactly described or any definite price or area agreed upon, nor was an attempt made to relate the value of the land to the value of the debt.

The defendant was therefore bound to carry out the agreement within a reasonable time without the refinements applicable to a delay in a contract for the sale of land. This he had failed to do, thus entitling the plaintiff to repudiate the agreement and sue for the debt.

Re Engall's Agreement [1953] 1 W.L.R. 977; [1953] 2 All E.R. 503

Estate contract—vacation of land charge—Land Charges Act, 1925, *s.* 10 (8).—An application to the court under section 10 (8) of the Land Charges Act, 1925, for an order for the vacation of the registration of an estate contract, cannot be made if its real purpose is to obtain adjudication on the existence or non-existence of the contract. The vendors had delayed completion under the contract for sale, and, presumably to put pressure upon them, the purchasers had registered it. The vendors then wished to sell elsewhere, but the purchasers refused to withdraw the registration. Vaisey J. said that it was putting the cart before the horse to ask for the removal of a land charge before the substantive issue had been decided by action.

Hartley v. *Mayoh & Co.* [1953] 2 All E.R. 525

Landowner's duty of care to fireman.—Barry J. at Manchester Assizes has followed Hallett J.'s decision in *Merrington* v. *Ironbridge Metal Works, Ltd.* [1952] 2 All E.R. 1101 (see note *ante,* p. 81).

2. *TRUSTS*

Re Aberconway's Settlement Trusts [1953] 3 W.L.R. 183; [1953] 2 All E.R. 350

Settlement—provision discouraging tenant for life from exercising statutory powers—Settled Land Act, 1925, *s.* 106.—The Court of Appeal have varied the decision of Danckwerts J. at first instance: [1952] 2 T.L.R. 796; [1952] 2 All E.R. 981; see note *ante*, p. 85. It may be remembered that by the so-called Garden settlement which was the subject of the action, money had been vested in trustees on trust for sale, and settled by reference to an earlier strict settlement, the so-called Bodnant settlement, to be applied for the management and upkeep of certain gardens settled by the Bodnant settlement, during a "prescribed period." This period was to last within the time allowed by the perpetuity rule while "the said gardens should be and remain settled." Subsequently the greater part of the gardens had been sold by the tenant for life of the Bodnant settlement, and the trustees sought direction as to the effect of this upon the Garden settlement.

The court agreed with the first part of Danckwerts J.'s judgment to the effect that on the construction of the Garden settlement, and without considering the effect of section 106 of the Settled Land Act, 1925, the "prescribed period" had come to an end. "The said gardens at Bodnant" meant the actual subject-matter described in the settlement, and as the greater part of the land had been sold, it could not be said that the "said gardens" still remained settled land.

It was upon the second and most difficult question that their Lordships came to differing views, namely, whether the terms of the "prescribed period" were void under section 106 of the Settled Land Act, 1925, as a fetter or deterrent to prevent the tenant for life from exercising his statutory powers. Denning L.J. agreed with Danckwerts J. that section 106 applied, for if, said the learned Lord Justice, upon a strict construction of the Garden settlement you say to the tenant for life, "if you sell a part of the gardens . . . the income allotted to the gardens will cease . . . ," that will tend to induce him to abstain from selling. Denning L.J. thought that if the provision was void, it was permissible for the court to modify the trust as far as necessary to meet the new situation, and that the trusts of the Garden settlement should be made to apply to the part of the gardens still retained. His Lordship thought that this was what had been done in *Re Patten* [1929] 2 Ch. 276, with regard to the furniture, but that in *Re Simpson* [1913] 1 Ch. 277 and *Re Burden* [1948] Ch. 160, the trusts with regard to the rates failed for want of any content, as would have been so in the present case had all the gardens been sold.

Evershed M.R. and Romer L.J. came to the opposite conclusion for several reasons. Firstly, the learned Master of the Rolls emphasised that a purely objective test must be applied to tenants for life in cases such as this, and no reference should be made to the particular idiosyncrasies of particular tenants for life.

Considering the settlement itself, the learned Master of the Rolls found that it was a serious objection that he could not discover which

was the exact phrase or limitation which was void. If it was "while the said gardens shall be and remain settled," then the prescribed period would continue during the whole perpetuity period, and this would leave a big lacuna in the settlement should all the gardens be sold. In effect, he thought that section 106 could not be invoked if the effect was to redraft the operative parts of the settlement or alter its expressed purpose, "for it cannot have been the intention of Parliament to put an almost unlimited restriction on the powers of persons desiring to make settlements of their own property in the way they think best."

Turning to the authorities on the interpretation of section 106, Evershed M.R. and Romer L.J. unhesitatingly came to the conclusion, after considering *Re Simpson* (*supra*) and *Re Patten* (*supra*), that there was no deterrent within section 106 in the Garden settlement. Their Lordships pointed out that the application of the income and management of the gardens was wholly within the trustees' discretion, and that the garden trust was only indirectly for the benefit of a tenant for life who happened to be a keen horticulturist. The trust was for a public object of similar character to a charity, and the provisions for ending it were very far removed from provisions ending a trust under which a beneficiary received some independent benefit until he exercised a statutory power. "Section 106," said Evershed M.R., "should not be taken as operating to render void directions in a settlement operating to determine other provisions in the settlement which are neither for the benefit (properly speaking) of any *cestui que trust* nor even, in strictness, ancillary to the enjoyment by him of the trust property."

With respect one cannot but feel in agreement with the views of the learned Master of the Rolls and Romer L.J. As Denning L.J. observed, the real difficulty is the destination of the trust income if the section does apply. It remains for the House of Lords to consider finally this very difficult problem.

Re Shephard [1953] 3 W.L.R. 378; [1953] 2 All E.R. 608

Advancement—subsequent conduct—admissibility.—The Court of Appeal have affirmed and agreed with the judgment of Harman J. at first instance. See *ante*, p. 154; *sub nom. Shephard* v. *Cartwright* [1953] 1 W.L.R. 460; [1953] 1 All E.R. 569.

It was argued before the court that the claims were statute-barred, the disputed dispositions having been made nearly twenty years before the action, but Evershed M.R. and Denning L.J. pointed out that if there had been an advancement as was alleged, the testator was a trustee of the property who had converted it to his own use, and therefore by section 19 (1) (*b*) of the Limitation Act, 1939, his children's claims were not bound by any period of limitation.

On a lengthy consideration of the evidence, Evershed M.R. and Romer L.J. thought that the testator had intended to confer a benefit on the children, but of a nebulous character, as in *Devoy* v. *Devoy* (1857) 3 Sm. & G. 403, and not of such a nature as to make the

testator's estate accountable. Evershed M.R. emphasised that the onus of proof of establishing absolute and unqualified gifts rested very heavily upon the children. Denning L.J. thought that the testator had not intended to benefit the children at all, and that their claims were, in the circumstances, monstrous.

The court also considered the second problem discussed by Harman J., namely, the admissibility in evidence of acts and declarations of the donor subsequent to the disposition alleged to be an advancement. Their Lordships came to differing conclusions. Denning L.J., who agreed with Harman J., thought that the admissibility of evidence in cases of advancement was governed by the same rules as in other civil actions. He did not think it was correct to say, as in the textbooks (see Underhill on Trusts, 10th ed., p. 187, and Lewin on Trusts, 15th ed., pp. 148, 152, 153), that subsequent acts are inadmissible unless against interest, and he referred to *Marshall* v. *Crutwell* (1875) L.R. 20 Eq. 328, and *Pole* v. *Pole* (1748) 1 Ves.Sen. 76. He thought that if a subsequent act of the donor was not against interest, it might affect its weight but not its admissibility.

Evershed M.R. felt inclined the same way as Denning L.J., but in view of the authorities the other way (*e.g.*, *Sidmouth* v. *Sidmouth* (1846) 2 Beav. 447), and in view of the fact that the evidence of the testator's subsequent conduct in the present case was clearly admissible as against interest, he expressed no opinion on the general problem. He did say, however, that as acts by the testator against his interest had thus been admitted, there could not be excluded such parts of the story as tended in the other direction. The testator's conduct should be considered in its entirety.

Romer L.J. agreed with the strict view as expressed in the textbooks which he felt was of long-standing authority. He thought that the reason for the exclusion of subsequent acts and declarations of the parent was that the parent could so easily manufacture them. See *Warren* v. *Gurney* [1944] 2 All E.R. 472. The learned Lord Justice, without attempting to be exhaustive, defined three categories of conduct by the father which qualified as exceptions to the rule; first, evidence of acts by both parent and child against interest; secondly, acts bound up with the original transaction so as to form part of it; and thirdly, acts tending to show a course of dealing between parent and child.

It remains to say that notwithstanding Romer L.J.'s unqualified support, the law as stated in the textbooks has become rather uncertain as a result of this case, and it cannot but be hoped that when the matter comes up again the simple rule adopted by Denning L.J. will be applied.

Re Dargie [1953] 1 W.L.R. 991; [1953] 2 All E.R. 577

Litigation to secure personal rights of trustee—costs—indemnity. —Any sum disallowed from a solicitor and client taxation on a trustee's bill of costs cannot, on some principle of higher equity, be pocketed by the trustee out of the trust estate. This, Vaisey J.

held, was shown conclusively by his own decision in *Re Robertson* [1949] 1 All E.R. 1042, which would otherwise have been entirely unnecessary.

The plaintiff beneficiary had brought a hostile action against the defendant trustees to assert a personal pecuniary right against them, and Wynn-Parry J. found in favour of the beneficiary on some points and the trustees on others, and ordered that the defendants' costs should be taxed as between solicitor and client, and that these costs " when taxed be retained and paid by the defendants . . . out of the estate. . . ." This was done, but the defendants also pocketed from the estate the sum disallowed by the taxing master.

The learned judge distinguished the present case, where the litigation was designed to define and secure the personal rights of the trustees as individuals, from one commenced solely to benefit the trust estate, and in which it is generally considered that the trustees are entitled to their costs on an indemnity basis. The order stated plainly what Wynn-Parry J. had intended (*cf.* the order in *Poole* v. *Pass* (1839) 1 Beav. 600), and it was extremely improper for the trustees to allow the costs to be taxed when they intended to disregard the taxation altogether. The trustees' right course would have been either to refer the question to Wynn-Parry J. and ask for an amendment of the order, or to apply to the taxing master to review the taxation on the ground that trustees ought not to be put to any expense within reason and therefore their costs should be on a wider basis.

Re Maltby Marriage Settlement [1953] 1 W.L.R. 765; [1953] 2 All E.R. 220

After-acquired property clause—" become entitled in possession or reversion."—Here a wife had covenanted in her marriage settlement in one of the common forms " that there should be duly vested in the trustees all real and personal property . . . to which the wife may afterwards during the marriage become entitled in possession or reversion. . . ." The question was whether this clause was wide enough to catch an interest vesting in possession during the marriage which had vested in reversion beforehand. As Harman J. said, it would appear apart from authority that such an interest should not be caught, as it could have been settled without difficulty at the time of the marriage. After-acquired property clauses are designed to deal with interests which are unknown or uncertain at the time of the marriage.

The learned judge referred to *Re Bland's Settlement* [1905] 1 Ch. 4, and *Re Williams' Settlement* [1911] 1 Ch. 441, which supported his view, and then to *Re Crook's Settlement* [1923] 2 Ch. 339, which contradicted it. However, Lawrence J. in the latter case said that as the cases were not easy to reconcile, he was free to follow his own opinion, and therefore Harman J. felt that he was in the same position in the present case, and held that the reversionary interest which had fallen into possession was not caught by the clause.

The learned judge held secondly that the clause did catch the wife's share in a fund appointed to her after the marriage. She had had an interest in default of appointment in the fund in question at the date of the marriage, but because of the appointment she had not inherited under that interest.

Re Rooke [1953] 2 W.L.R. 1176; [1953] 2 All E.R. 110

Trust for sale—power to postpone sale—contrary intention—Law of Property Act, 1925, s. 25 (1).—In a trust for sale of land, when is there a contrary intention sufficient to exclude the power to postpone sale implied by section 25 (1) of the Law of Property Act, 1925? In this case Harman J. adopted the view of Page Wood V.-C. in *Scriven* v. *Sandon* (1862) 2 J. & H. 743, 744, when dealing with section 27 of the Wills Act, 1837, and held that a contrary intention means that something must be found in the instrument inconsistent with the view that the statutory power of postponement is to be implied. The power to postpone is therefore in fact discretionary although section 25 (1) is mandatory in form.

In the will which created the trust for sale in the present case, the testator said that he wished the land to be sold " as soon as possible after his death," and made it apparent that if he had not sold it himself by the time of his death, he was most anxious that it should be disposed of at once. Harman J. held therefore that the words were sufficiently imperative to make them inconsistent with a discretionary power of postponement.

In the course of his judgment the learned judge referred to *Re Smith* [1896] 1 Ch. 171, a case under the earlier law, and disagreed with the view attributed to Luxmoore J. in a very poor report of *Re Ball* [1930] W.N. 111, as to the effect of section 25 (1) of the Law of Property Act, 1925. Harman J. said it was obvious that contrary to what Luxmoore J. was reported to have said, the law had been altered by section 25 (1), for since 1925 a power to postpone was implied into many trusts where none had existed previously.

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Baddeley v. *I. R. C.* [1953] 3 W.L.R. 135; [1953] 2 All E.R. 233

Fourth class of charity—wellbeing—improvement of mankind.—The decision of the Court of Appeal in this case is of the greatest importance. It blazes a novel trail through the charity jungle, and it is noteworthy that the principal judgment was that of Jenkins L.J. whose interest in legal consistency and predictability is clear in all his

judgments. The décision at first instance had been a considerable shock to many associations and funds. Important playing fields trusts feared that their objects were not technically charitable. Hence the decision on appeal will come as a relief. But the task of the lawyer is not made very easy, when it comes to delineating the limits of the new doctrine. It will be remembered that the terms of the trusts in this case provided for the promotion of religious, social, moral and physical wellbeing through the provision of various activities including recreation and social activity. Was this properly described as "for charitable purposes only"? The Court of Appeal might have solved the problem more deviously by relying on the fact that the trust set up a fund for the Methodist Churches in West Ham and Leyton in East London, and cut down its objects to those which were directly related to church work (Jarman, 8th ed., 247 (*l*)). It might have emphasised the clause of providing for members unable to afford to provide them for themselves (*cf. Re Hadden* [1932] 1 Ch. 133). It might have construed the social purposes as ancillary to the basically educational objectives of the Methodist clubs and youth groups in teaching the religious life (*Re Mellody* [1918] 1 Ch. 228). Thus the trust could have been forced within one or other or all of the three main classifications of charity. Instead it has come boldly out for a classification under the fourth head of charity. The nearest analogies, and they were admittedly not very near, were the cases on village clubs (*Re Scowcroft* [1898] 2 Ch. 638), recreation for the working classes (*Re Hadden* [1932] 1 Ch. 133) or kindness to animals (*Re Wedgwood* [1915] 1 Ch. 113). The first type of case recognised the value of social intercourse, the second of physical fitness and the third of moral calibre. But there were other cases hardly recognised as charitable which came very near. Though a trust for physical training of the schoolchild or physical rehabilitation of the wounded ex-service man clearly comes within the definition of charitable trusts, it is equally clear that the organisation of sport for its own sake, *e.g.*, yachting or tennis trophies for adults, is not (*Re Nottage* [1895] 2 Ch. 649) any more than provision of a banquet would seem to be (*Re Barnett* (1908) 24 T.L.R. 788). In other words the test would seem to be whether sport and society are means to an end or ends in themselves. A clear distinction exists between preparation for a profession, which is educational, and the practice of the profession, which is not (*Re Royal College of Surgeons* [1899] 1 Q.B. 871; *Re Bland-Sutton* [1951] Ch. 485). Can such a distinction be applied to recreation or social intercourse? Is a social club attached to a church a preparation for something else or it is something which is enjoyed and used for its own sake? Jenkins L.J. described the main object of the trust as the improvement of members of the church. The promotion of wellbeing meant the raising of standards of social behaviour and physical fitness as pre-requisites to other things, and not as ends in themselves. Participants would be better able to do their duty to God, towards their neighbours and themselves (p. 147).

If such a constant progression is hardly capable of satisfying our usual notions of training and education, it is certainly a glorious vision. Euphoria is becoming a favourite cliché of our times, and the preservation of health is extended to the maintenance of wellbeing. Here the

influence of *Re Shaw's Will Trusts* [1952] 1 All E.R. 49 is clear. The grooming of the Irish people in social graces was no less charitable because it was not limited to youth. As education goes on throughout life, the improvement of the individual is equally unlimited in time and infinite in scope.

Charity has for long connoted the helping of the under-dog, reflecting the old-fashioned idea that people should have opportunities to enter the arena on equal terms with their fellows. Once armed for the fray their fate was in their own hands. In the time of the welfare state the notion of charity can go further and can make the arena itself a better place.

This case seems clearly distinguishable from *I. R. C.* v. *City of Glasgow Police Athletic Association* [1953] 1 All E.R. 747; [1953] 2 W.L.R. 625 (noted *ante*, p. 244), in that, in that case, the police organised sports for themselves for their own recreation, without much connection with their work. In the instant case the social and recreational side was very much the work of the Church leaders and intended to fit in with the religious activities of the Church. The Court of Appeal have here emphasised that the sporting objects of that association were quite distinct from the work of the police force. Another decision of the House of Lords, *Re Williams* [1947] A.C. 447, was distinguished in that the club there envisaged had no particular connection with other activities and was to serve a very indefinite membership. Here the leaders were given power to select as participant members or genuinely prospective members of the Methodist Church (at p. 162).

The Court of Appeal dealt at some length with the nature of the fourth class of charity and its relation to the other three, but this was mainly due to certain arguments addressed to them on this point which do not seem to have had much foundation (pp. 153–4). No clear principle emerged.

An interesting point was the decision that the Methodist Church is a public group and therefore that the necessary element of public benefit was present (p. 162).

(Theobald 279.)

Re Warre's Will Trusts [1953] 1 W.L.R. 725; [1953] 2 All E.R. 99

Non-charitable religious object trust fails for uncertainty—gift over fails.—In this case the testatrix left residuary estate for the purpose of providing a religious place of retreat. Harman J. held that this lacked the element of public benefit, and, following *Gilmour* v. *Coats* [1949] A.C. 426, was not charitable. The analogy with the contemplative inactivity of nuns was indeed close. Only the participant benefited from this form of withdrawal and meditation. It was also held that the objects of the trust were too indefinite to be effective as an object-trust. This part of the judgment is brief as at present reported. The trustees had a wide discretion as to the form which the retreat should take. The trust was therefore uncertain, and was not saved by the existence of this discretion (possibly a reference to the type of case such as *Re Coxen* [1948] Ch. 747). The analogy

with the training of mediums and similar cases was close, and control over the trustees could hardly have been effective. There was an ultimate gift over to charity but it was held that this also failed so that the trusts of residue were completely void. Presumably it was impossible to treat the gift as one made to charity subject to or charged with the provision of a retreat. There was no general charitable intention present. The testator meant this gift over to operate only if the retreat scheme was tried and proved unpracticable, which would not extend to initial failure, as in this case. There is also a line of authorities in which it is held that a charity cannot be given a balance after an unascertainable expenditure. In this case setting up the retreat might use up much of the trust fund and ultimate failure would not salvage that. The gift over was therefore incapable of quantification. An instance of the quantification problem is *Re Porter* [1925] Ch. 746, where a gift to build a masonic temple and a gift over of the surplus of the fund to charity, failed completely.

(Theobald 277, 282, 283, 343.)

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Rooke [1953] 2 W.L.R. 1176; [1953] 2 All E.R. 110

Effect of failure of gift over on first gift—divesting—implied condition.—In this case a testator left residue in trust for his wife for life, with a gift over to named brothers and sisters. If any of the latter predeceased the wife their issue were to take their shares. This did not provide for the event which happened, the death of a sister before the widow but childless. The general rule is that a divesting event operates even if the gift over itself fails to take effect, and this is often reasonable. But to cut down the absolute gift to the sister for non-existent issue was hardly sensible. It was therefore held that one could imply a condition of being survived by issue and the deceased sister's estate took, following dicta in *Hurst* v. *Hurst* (1882) 21 Ch.D. 278. The court referred to Jarman, 8th ed., 1445, 1446. (See also Jarman, 578, for other cases). The clause in this will was curious and not well drafted. Presumably it was intended to prevent a lapse through failure by the sister to survive the widow but the gift over was not a class gift postponed to the widow's death but an immediate gift of a remainder to named persons, so that failure to survive the widow was immaterial. The draftsman's caution led him to introduce a problem where none existed.

(Theobald 454, 455.)

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5. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Preston and Area Rent Tribunal v. *Pickavance* [1953] 3 W.L.R. 242; [1953] 2 All E.R. 438

Furnished Houses (Rent Control) Act, 1946, *and Landlord and Tenant (Rent Control) Act*, 1949—*security of tenure—notice to quit given more than three months after tribunal's decision—"construed as one" provision—interpretation of Acts—jurisdiction to give further security.*—Human nature being what it is, there is a certain satisfaction in finding that the House of Lords have now taken the view which one has held since 1949, despite contrary decisions by the Divisional Court and the majority of the Court of Appeal. The House of Lords have agreed with the very convincing minority opinion of Jenkins L.J. in the *Pickavance Case*. It will be recalled that the Divisional Court and the majority of the Court of Appeal adopted a very restrictive interpretation of section 11 (1) of the 1949 Act, and held that, as a result of the "construed as one" provision of section 11 (5), section 11 (1) had to be treated as subordinate to section 5 of the 1946 Act, so that security of tenure could not be given under section 11 (1) if a notice to quit had been served one day after the three months' period mentioned in section 5 had expired. As under section 5 of the 1946 Act the notice to quit had to be a notice served on the lessee before the decision of the tribunal or within three months afterwards, this restrictive interpretation meant that section 11 of the 1949 Act applied only where the notice to quit had been given within that time. This interpretation was not the natural one and failed to give full effect to the words "by virtue of the contract" in section 11 (1). It was supported by reference to the alleged anomalies which would be produced by the other interpretation—always a risky line of thought. The House of Lords, in arriving at (if one may say so with respect) the sound interpretation, have pointed out that the "construed as one" provision in section 11 (5) does not say that section 11 is to be construed as one with *section 5* of the 1946 Act but that it is to be construed as one with the 1946 Act, and that in any case "construing as one" does not mean that the limitation on the kind of notice to quit affected by section 5 is to be read into the general words of section 11.

Readers should annotate page 196 of Mr. T. J. Sophian's article in *The Conveyancer* for May–June, 1953, in accordance with the decision now given by the House of Lords. It should be noted that Lord Porter went out of his way to express the view that the Divisional Court's decision in *R.* v. *Folkestone and Area Rent Tribunal, ex p. Sharkey* [1952] 1 K.B. 54, was correct, although the reasoning of the Lord Chief Justice might be based on too limited a ground. In *Sharkey's Case* it was held that an application could only be made under section 11 (1) of the 1949 Act where a reference under the 1946 Act had been made before the service of a notice to quit; the "construed as one" provision was material in this case also. The *Sharkey* decision has been criticised ((1952) 68 L.Q.R. 22) and is

contrary to the view assumed by the Court of Appeal in *Francis Jackson Developments, Ltd.* v. *Hall* [1951] 2 K.B. 488, but it can now rest on Lord Porter's approval. It should also be noted that Lord Porter, Lord Reid and Lord Tucker express the view that section 11 of the 1949 Act applies where the reference under the 1946 Act has been by the lessor or by the lessee or by the local authority, whereas section 5 of the 1946 Act applies only where the reference has been made by the lessee or the local authority.

(Megarry, 7th ed., pp. 447–8; Rent Restrictions Guide, pp. 98–9.)

Mauray v. *Durley Chine (Investments), Ltd.* [1953] 3 W.L.R. 296; [1953] 2 All E.R. 458

Furnished Houses (Rent Control) Act, 1946—*reduction of rent by tribunal—effect on option exercisable by tenant to claim a new lease.* —The Court of Appeal have affirmed, although on somewhat different grounds, the decision of Gerrard J. in this case. The question was whether an option given to the tenant to take a new lease at the same rent and on the same terms as the existing lease remained valid and exercisable by the tenant notwithstanding the fact that, subsequently to the date of the document creating the option, the rent is reduced by a rent tribunal under the Furnished Houses (Rent Control) Act, 1946. The landlords contended that the option was void for illegality since it provided for the grant of a new lease at a rent which, owing to the decision of the rent tribunal, it was unlawful to demand. The Court of Appeal agreed with Gerrard J. in rejecting this contention, but based their decision on the ground that at the date when the option was exercised the new term which it claimed was a term which would begin after the date then fixed for the expiry of the Furnished Houses (Rent Control) Act, 1946. At the date of the exercise of the option it appeared that there was nothing unlawful in a lease being granted (to commence *in futuro*) at the unreduced rent, since the statute which made it illegal to require or receive the unreduced rent was due to expire before the commencement of the term. The fact that the operation of the statute might be extended (as it was) did not invalidate the option but merely introduced a risk that the landlords would not be able to recover the full rent mentioned in the lease. The court also rejected an argument that the option was not validly exercised because after mentioning the unreduced rent of £525 it went on to say " reduced to £425 by the decision of the rent tribunal for Bournemouth and area notified on February 2, 1950." The court held that these words were a mere parenthetical reference to the effect of the tribunal's decision and were not an attempt to substitute a different rent from that specified in the option. Jenkins L.J. had some critical remarks to make about an Act which was intended to prevent the exploitation of tenants by landlords being used as an engine for the exploitation of landlords by tenants.

(Rent Restrictions Guide, 3rd ed., pp. 117–23; Megarry, 7th ed., pp. 439 *et seq.*)

Butler v. *Hudson* [1953] 3 W.L.R. 227; [1953] 2 All E.R. 418

Rent Restrictions Acts—procedure—application for declaration in regard to statutory tenancy—1920 *Rules—section* 17 (2) *of* 1920 *Act —jurisdiction of registrar and judge.*—As this case is mainly of interest as disclosing a chapter of procedural accidents, it is proposed to do no more than note briefly the points covered:—

(1) An application under rule 19 of the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, for a decision on the question who is entitled to a statutory tenancy in accordance with the definition of a "tenant" in section 12 (1) (*g*) of the 1920 Act, is competent only when the question is which of competing members of the deceased tenant's family is entitled to the statutory tenancy. This procedure cannot be used to decide whether the sole claimant to a statutory tenancy is or is not entitled to it.

(2) Despite the general wording of rule 7 (*b*) of the 1920 Rules, the county court judge has power only to vary the registrar's order under rule 19, not to rescind it.

(3) In hearing an application to vary under rule 19, the county court judge is sitting as a judge of first instance and not in an appellate capacity.

(4) Section 90 of the County Courts Act, 1934, authorises a reference for inquiry and report only. A reference to a handwriting expert for an opinion in the nature of expert evidence is not so authorised.

(5) It is not quite certain whether section 17 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, gives the county court power to make a declaratory judgment in a claim or proceeding arising out of the Rent Acts.

(Rent Restrictions Guide, 3rd ed., p. 201; Megarry, 7th ed., pp. 210, 669.)

Taylor v. *Willoughby* [1953] 1 W.L.R. 1021; [1953] 2 All E.R. 642

Rent Restrictions Acts—1920 *Rules—procedure under rules* 1 *and* 19 *to determine competing claims to succession by different members of family—procedure not mandatory.*—The provisions contained in rules 1 and 19 of the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, for solving a dispute between competing claimants to succession to a tenancy under section 12 (1) (*g*) of the 1920 Act, are not mandatory. The Court of Appeal, therefore, allowed an appeal from the decision of a county court judge dismissing an action for possession brought by one of the claimants against the other (on the ground that the procedure laid down in the rules was mandatory) and ordering that proceedings should be brought under the rules to settle the dispute. The Court of Appeal set aside the order dismissing the action, with the result that the proceedings would be treated as standing over, and gave either party express liberty to apply. Either party would thus be at liberty to make an application

under the rules, or to apply in the action to amend the pleadings, or otherwise as they thought fit.

(Rent Restrictions Guide, 3rd ed., p. 207; Megarry, 7th ed., pp. 210, 669.)

Mills v. *Allen* [1953] 3 W.L.R. 356; [1953] 2 All E.R. 534

Rent Restrictions Acts—Small Tenements Recovery Act—order for possession—indefinite suspension of order—order statute-barred—absolute and conditional orders.—This case discusses but does not decide the difficult point left open in *American Economic Laundry, Ltd.* v. *Little* [1951] 1 K.B. 400, namely, what is the position, so far as a member of the family otherwise entitled to succeed to a tenancy under section 12 (1) (*g*) of the 1920 Act is concerned, if his predecessor dies during the period when a conditional (as distinct from an absolute) order for possession is in effective operation. In *Little's Case* it was held that a tenant, against whom an absolute order had been made but who died during the period for which the execution of the order had been suspended, was not a "tenant" within section 12 (1) (*g*) so as to transmit a statutory tenancy to his daughter. Evershed M.R. in the present case shows that there are formidable difficulties in the way of holding that the existence of an operative conditional order does not prevent a "succession" taking place under section 12 (1) (*g*). These difficulties are still unresolved. It was unnecessary to resolve them because the successor remained in occupation in *Mills* v. *Allen* after the order for possession, whether it was absolute or whether it was conditional, had ceased to have any efficacy at all owing to section 2 (4) of the Limitation Act, 1939. There was some doubt whether the order was in fact an absolute or conditional one, but in any case more than twelve years had passed since the time when the order became enforceable, and thus the Statute of Limitations barred any action upon it. If the order was absolute it put an end immediately to the statutory tenancy which existed when the order was made; in that case the tenant's continued occupation was referable to a new contractual tenancy. If the order was conditional the continued occupation was referable to a continuance of the statutory tenancy. In either case the tenant's successor was entitled to rely on section 12 (1) (*g*): *Moodie* v. *Hosegood* [1952] A.C. 61. It should be noted that Evershed M.R. expressed the view that an order for possession suspended indefinitely or an order likely to be in suspense for a long time is not the best form of order where there is a possibility of a claim under section 12 (1) (*g*). It would be better to make an order requiring the defendant to agree to pay the rent and arrears or to perform the other relevant conditions and make no order for possession, but to give liberty to apply for an order for possession if the defendant does not fulfil the conditions. Then if an order for possession has to be made it is likely to be an absolute order operating immediately.

(Rent Restrictions Guide, 3rd ed., p. 96; Megarry, 7th ed., p. 230.)

Hazell, Watson & Viney, Ltd. v. *Malvermi* [1953] 1 W.L.R. 782; [1953] 2 All E.R. 58

Rent Restrictions Acts—premises outside rateable value limits in 1939—war damage—reduction in rateable value—whether change of identity.—In this case premises which, as a result of the landlord's acceptance of rent with knowledge of their residential use despite a covenant to use for certain business purposes only, had to be treated as a dwelling-house had a rateable value on April 6, 1939, which took them outside the Rent Restrictions Acts. During the war the premises suffered substantial war damage but not such as, in the opinion of McNair J., to change their identity. There were one or two alterations in the valuation of the premises for rating but the first assessment after the war damage was found by the judge to be one made in 1948 which restored the valuation to the pre-war figure. In 1950 another valuation for rating was made, when for the first time the effects of the war damage were taken into account. This resulted in the rateable value being reduced to a figure within the Rent Acts limit. McNair J. held (a) that as there had been no change of identity, the rateable value for the purpose of the Rent Acts was that shown in the valuation list on April 6, 1939; (b) even if there had been a change of identity the rateable value which would be material for Rent Acts purposes would be that at which the premises were first assessed after the damage, although that assessment did not take the war damage into account. In either case the rateable value was such as to exclude the premises from the Rent Acts, and the landlord succeeded in a claim for possession.

(Rent Restrictions Guide, 3rd ed., pp. 11, 30; Megarry, 7th ed., pp. 165, 105–10.)

Marela, Ltd. v. *Machorowski* [1953] 2 W.L.R. 831; [1953] 1 All E.R. 960

Rent Restrictions Acts—closing order under Public Health (London) Act, 1936—premises not taken out of Rent Restrictions Acts —contrast with closing order under Housing Act, 1936.—Section 156 (1) of the Housing Act, 1936, which enables a landlord to obtain possession of any part of a building or underground room where a closing order is in force applies only to closing orders made under section 12 of that Act, and has no application to a closing order in respect of a whole house under the Fifth Schedule to the Public Health (London) Act, 1936. The latter type of closing order does not affect the protection given by the Rent Acts. The court decided this point on the construction of section 156 (1). In the course of their judgments the Lords Justices drew the following contrasts between the two types of closing orders. A closing order under the Housing Act, 1936, applies to a "part of a building or underground room"; a closing order under the Public Health (London) Act, 1936, applies to the whole house. The former is the analogue, in the case of part of a building, to a demolition order for a whole house; the latter is merely

one means of enforcing requirements as to repair. The former is made to ensure that the subject-matter is not used; the latter can be revoked when the work is done. The former is made by the local authority; the latter is made by the justices. The former is associated with provisions for payment of the cost of the removal of the occupants; the latter is not.

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6. *MISCELLANEOUS*

Tunstall v. *Tunstall* [1953] 1 W.L.R. 770; [1953] 2 All E.R. 310

Husband and wife—claim by wife to share in proceeds of sale of house—Married Women's Property Act, 1882, *s.* 17.—The Court of Appeal did not lay down any new law in this case, but it seems that previous decisions to the same effect have not been reported. The Married Women's Property Act, 1882, s. 17, provides that any question between husband and wife "as to the title to or possession of property" may be decided in a summary way and the court may make such order with respect to the property in dispute as it thinks fit. In the instant case, the husband sold the matrimonial home, the furniture in it and a motor-car, and the wife claimed a share of the proceeds of sale, alleging that she had contributed £355 to their cost. An order was made by the master that the parties should share the proceeds of sale equally—an order, incidentally, considerably in excess of the wife's claim—and the judge upheld the master's order. During the course of an appeal on the merits a member of the Court of Appeal raised the question whether the procedure under section 17 was appropriate and, in the result, the court held that there is no means under the section of giving a money judgment. The section applies to a dispute as to the title to or possession of property, including a fund of money in a bank or with a third party, as in *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63 (noted Vol. 16, p. 489), but there was no such dispute here. Either the wife should have proceeded under section 17 before the husband sold the property or she should have proceeded under section 12, which enables a wife to take proceedings against her husband for the protection and security of her property.

Dean v. *Prince* [1953] 3 W.L.R. 271; [1953] 2 All E.R. 636

Valuation of shares under company's articles—going behind the valuation—method of valuation.—Two distinct points of importance were decided in this case: the first, whether the court could go behind the valuation certified by an auditor in accordance with a company's articles, and the second, the method of valuation. The articles of the company provided that in certain circumstances a person entitled to shares in the company should sell them "at such price as is certified in writing by the auditor to be in his opinion the fair value thereof . . . and in so certifying the auditor shall be considered to act as an

expert and not as an auditor and accordingly the Arbitration Act, 1889, shall not apply." The auditor issued a certificate of value without indicating how the value had been arrived at, but the plaintiff's solicitors managed to persuade him to indicate the method he had adopted. No one could have compelled the auditor to give his reasons and, had he remained silent, his decision could only have been challenged on the ground of fraud; but, having given his reasons, the court held, following *Johnston* v. *Chestergate Hat Manufacturing Co., Ltd.* [1915] 2 Ch. 338, that it could examine the reasons to see whether the auditor had proceeded in accordance with the correct principles.

The parcel of shares which fell to be valued constituted a controlling interest in the company. The auditor (i) valued the shares on the basis of the break-up value of the assets and not as a going concern, and (ii) did not attribute any value to the control of the company afforded by the shares. The reason why the auditor had valued the assets on the basis of the break-up value was that the business of the company was being carried on at a loss and in his view the company should have been wound up. The court held that, nevertheless, having regard to the fact that the parcel of shares to be valued constituted a controlling interest, this was the wrong basis. The hypothetical buyer of such a parcel would have been in a position to sell the whole concern lock, stock and barrel.

The court was asked to make a declaration of the basis on which the valuation should be made and then direct an inquiry on that footing. It declined to do so but limited itself to declaring the valuation was not binding and restraining the company from acting upon it. Nevertheless, as will have been gathered, the court in fact indicated the factors to be taken into account and decided that majority holdings are not to be valued on the same basis as minority holdings.

Re Howell [1953] 1 W.L.R. 1034; [1953] 2 All E.R. 604

Family provision—application by children of first marriage—date at which reasonableness should be determined.—The testator in this case had two children by his first marriage who lived with him until his death. By his will he gave all his estate, amounting to £2,500, to his second wife—it may be noted that under the new intestacy provisions the result on intestacy would have been the same—and appointed her guardian of the children. After his death the second wife became ill and unable to earn her living and the children went to reside with their mother, the first wife. The Court of Appeal, affirming the decision of Roxburgh J., dismissed the application of the children under the Inheritance (Family Provision) Act, 1938. Evershed M.R. said, at [1953] 1 W.L.R. 1038, that the test was: "Was the series of dispositions unwarranted in the circumstances as they presented, or should have presented, themselves to the testator at the moment of his death? For I think, prima facie, at any rate, that it must be right to judge this matter, whether the testator was unreasonable, in the light of the circumstances which did present, or should have presented themselves, to him up to the moment of his death. No doubt the

circumstances must include eventualities reasonably to be foreseen, but the testator ought not to be judged exclusively in the light of circumstances happening after his death, which might very much have altered the situation." The court also indicated that applications under the Act are very much matters for the exercise of the judge's discretion and the Court of Appeal should not readily interfere with the order of the court below.

THE LIBRARY

Current Legal Problems 1953. Edited by Professor G. W. KEETON, M.A., LL.D., and G. SCHWARZENBERGER, PH.D., DR.JUR. London: Stevens & Sons, Ltd. 1953. 314 and 10 pp. (£1 17s. 6d.)

This volume of printed versions of public lectures delivered at University College, London, during the Michaelmas, 1952, and Spring, 1953, terms contains a number of special interests to conveyancers. In particular Mr. E. H. Scammell's practical lecture, "The Development of Land under the Planning Acts," gives careful consideration to the practice permitting anyone, whether he has an interest in land or not, to apply for planning permission, a practice upheld in *Hanily* v. *Minister of Local Government and Planning* [1952] 2 Q.B. 444. He points out that the rights of the owner of the land are seriously affected, particularly where the application is refused. (Incidentally, some confusion in the type has arisen in lines 9 and 10 on p. 140.) He also deals fully with the position of a lessee who develops land with planning permission but without the lessor's consent. He takes the view, citing a number of cases in support, that the lessee may render himself liable for waste. Mr. O. R. Marshall, in his lecture, "The Failure of the Astor Trust," adds his voice to the chorus of dismay over Roxburgh J.'s decision in *Re Astor's Settlement Trusts* [1952] 1 All E.R. 1069, so far as it is based on the doctrine that a trust must fail if there is no one to enforce it. There is no doubt that, if Roxburgh J. is right on this point, a substantial number of purpose trusts are invalid, but in practice they have continued on their way in blissful disregard of the decision and in the hope that someone will take the point higher with more satisfactory results.

Mr. Valentine Latham's "The Creation and Administration of a Trust in the Conflict of Laws" deals with a subject which so far has received too little attention. His statement as to the law is undoubtedly sound. Mr. R. C. Fitzgerald's "The State and Title to Land" re-argues the case for land registration. As the extension of compulsory registration is quite inevitable we doubt whether there is anything more to be said on the subject, and it is to the principles and practice of registration that criticisms should be directed. Sir Raymond Evershed in his address on "The Influence of Remedies on Rights" was, not surprisingly, very discreet in his reference to the licence cases but he does say that he is somewhat uneasy about the implications of the rules laid down by the Court of Appeal.

E. F. G.

The Rent Acts. Seventh Edition. By R. E. MEGARRY, M.A., LL.B., Barrister-at-Law. Published by Stevens & Sons, Ltd. 1953. lxxxi and 736 pp. (£2 10s.)

A new edition of this excellent book is very welcome, particularly as it maintains the high quality of previous editions. *Megarry* has received much well-deserved praise as a textbook on the Rent Acts, but perhaps the greatest tribute to its merits is the frequency with which members of the Court of Appeal have found in it a neat and accurate statement of the law. Fortified by this confidence the author can bear with equanimity some rather unexpected opposition from north of the Border (Lord Mackay in *Alex. Cowan and Sons, Ltd.* v. *Acton* [1952] S.C. 73, at *e.g.*, 86; his attack appears to be unjustified).

Since the publication of this new edition, the author's criticism of the decision of the majority of the Court of Appeal in *Pickavance's Case* [1952] 2 Q.B. 370, has been vindicated by its reversal in the House of Lords: [1953] 3 W.L.R. 242.

It is mainly the remorseless growth of Rent Acts case law which has called for a new edition; the last edition was published as recently as 1951. Over 240 new cases have been woven into the fabric. The main new source of statutory material is the Crown Lessees (Protection of Sub-Tenants) Act, 1952. Other statutes, such as the Leasehold Property (Temporary Provisions) Act, 1951, impinge upon the Rent Acts system but are not part of it.

Among the interesting things in the new edition are the discussion of the doctrine of "possessory licences" (*Marcroft Wagons, Ltd.* v. *Smith* [1951] 2 K.B. 496; *Errington* v. *Errington* [1951] 1 K.B. 290); *Moodie* v. *Hosegood* and its strange consequences [1952] A.C. 61; and "Statutory Security of Tenure" (*Francis Jackson Developments, Ltd.* v. *Hall* [1951] 2 K.B. 488). The author has, however, obviously considered the whole text with care in the light of recent decisions, and has spared no pains in rewriting passages which have been affected by developments since the previous edition.

Megarry is a first-class textbook, impressive in the level of learning, lucidity and readability which it sustains. The author's own intense interest in the subject, and his evident mastery of it, are capable of stirring an interest in the student which a more pedestrian writer would fail to arouse.

The publishers are to be congratulated on the book's attractive binding and general appearance, and on the thinner paper which enables the pages to be increased by 100 while the bulk is actually reduced.

The conclusion is inevitable, that all concerned with the Rent Acts in a professional capacity should obtain a copy of the Seventh Edition of *Megarry*, preferably by lawful means.

J. M. W.

We have also received:—

Maxwell on The Interpretation of Statutes. Fourth edition. By G. Granville Sharp, Q.C., B.A., LL.B., and Brian Galpin, M.A., Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1953. 442 and cxxxix and 22 pp. (£2 5s.) No textbook runs into ten editions unless it is good. The editing has been done in a workmanlike, and not a mechanical, way; the new cases have been woven into the fabric of the text so that the book is still a coherent whole and not a patchwork quilt. Much of the historical matter has been excised, but there is still room for improvement. For example, it is quite settled that the parliamentary history of an Act cannot be looked to, so that there is no need to consider the earlier views to the contrary. In a subject where there seems to be one set of rules one way and an almost equal number cancelling them out it is essential that the current fashion should be adequately represented without being over-emphasised. This seems to have been done successfully.

Solicitor's Costs and Funds in Bankruptcy. By Maurice Share, B.A., Barrister-at-Law. Oyez Practice Notes. London: The Solicitor's Law Stationery Society. 73 pp. (10s. 6d.) The first 12½ pages dealing with the vesting of a bankrupt's property and payments made to a solicitor prior to bankruptcy are too compressed, even for practice notes, to be of much value. The rest of the booklet deals with the costs in bankruptcy and includes the 1952 bankruptcy scale and a number of precedents. This is the seventh booklet in this series dealing with costs and the total cost of the seven is £2 6s. No doubt as the earlier booklets get reprinted the prices will rise, increasing the total. A further booklet on costs in the Chancery and Queen's Bench Divisions is promised. Could not the publishers reduce the total price by publishing the whole lot in one volume?

Williams on Title. 1953 Supplement. By W. J. Williams, B.A., Barrister-at-Law. 99 and xx pp. (12s. 6d.) This supplement contains a noter-up of 42 pages and a number of short chapters on particular subjects, including town and country planning, agricultural land and a number of recent statutes. These chapters, unrelated as they are to the main work, do not fit very satisfactorily into a supplement.